OUTLINE OF AN ACTION

UNDER THE

ONTARIO JUDICATURE ACT

Showing at a Glance

THE PROCEDURE UNDER THE ACT AND RULES.

AN ADAPTATION OF MR. HERBERT E. BOYLE'S "PRÉCIS OF AN ACTION UNDER THE ENGLISH JUDICATURE ACTS AND RULES."

BY

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OUTLINE OF AN ACTION

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ONTARIO JUDICATURE ACT.

All actions and suits *which have hitherto been commenced* by writ in a Superior Court of Common Law, or by bill or information in Chancery, are to be commenced by

WRIT of Summons. *(Rules* 1, 5.*)*

May be issued in Toronto or in any County *(Rule* 20*)*.

To be prepared by plaintiff or his solicitor *(Rule* 23*)*.

Costs occasioned by use of more prolix form of writs or indorsements than those prescribed are to be borne by party using same, unless Court shall otherwise direct *(Rule* 6*)*.

To bear date on the day on which issued, and to be tested with name of President of the High Court *(Rule* 9*)*.

To require defendant to appear in 10 days if served in Ontario *(Rule* 9*)*.

To state on its face the office in which appearance is to be entered *(Rule* 22*)*.

To be issued. (1) In the Q. B. and C. P. Divisions alternately as heretofore.

(2) In the Chan. Division as heretofore *(Rule* 21*)*.

[Writs issued by the Clerk of Records and Writs, by Deputy Registrars and Deputy Clerks, need not be sealed or signed by the Clerk of the Process *(Rule* 21*)*.

WRIT of Summons—*continued.*

Indorsements to be made on writ.

The different kinds of indorsements are as follows :—

1. Statement of nature of claim or relief or remedy required *(Rule 5)*.
2. The division of the High Court to which action assigned *(Rule 5)*.
3. Representative character of plaintiff or defendant *(Rule 13)*.
4. Special indorsement where plaintiff claims a debt or liquidated demand only *(Rule 14)*.
5. In cases of liquidated demands or debts, amount of debt and costs, on payment of which proceedings will be stayed *(Rule 15)*.
6. Claim for account *(Rule 16)*.
7. Special indorsement in mortgage suits where immediate payment or possession sought *(Rule 17)*.
8. (a) Address of solicitor when plaintiff sues by a solicitor, or of the principal solicitor when solicitor issuing writ is only agent *(Rule 18)*.

   (b) Place of residence and occupation of plaintiff when he sues in person (*Rule* 19).

[And if he resides more than 2 miles from office from which writ issued, *also* another place not more than 2 miles from such office to be called his *address for service ;*

If no such endorsement made such plaintiff may be served with all notices, &c., by posting in such office (*Rule* 19).]

Not essential to state precise ground of complaint, or precise remedy or relief sought ; but plaintiff may amend so as to extend indorsement to any other cause

WRIT of Summons—*continued.*

of action or any additional remedy or relief, by leave of Court or Judge (*Rule* 11).

On presenting writ of summons for sealing, copy of writ and all endorsements may be left with the officer, signed by or for the solicitor, or by plaintiff if he sues in person *(Rule* 25.*)*

Concurrent Writs. One or more may be issued—

(a) At the time of issuing original writ *(Rule* 27*)*.

(b) At any time during twelve months after issue of original writ *(Rule* 27*)*.

(The months are calendar months.)

To bear teste same day as original writ, and to be marked "concurrent," and with date of issue *(Rule* 27*)*.

Writ for service within jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice is to be given, out of the jurisdiction; and writ for service (or whereof notice is to be given) out of the jurisdiction, may be issued as a concurrent writ with one for service within jurisdiction *(Rule* 28*)*.

A concurrent writ cannot be issued on a renewed writ after twelve months from the date of the original writ (*Coles* v. *Sherrard*, 11 *Ex.* 482).

Writ for service out of jurisdiction.

1. Where a defendant is a British subject, *see* form of writ, Forms 2.
2. Where a defendant is not a British subject, *see* form of notice in lieu of writ, Forms 3 *(Rule* 8*)*.

SERVICE of Writ (*within the Jurisdiction*).

No service required when defendant, by his solicitor, accepts service and undertakes to enter appearance (*Rule* 33). An attorney is liable to attachment for not

SERVICE of Writ (*within the jurisdiction*)—*continued.*

entering an appearance in pursuance of his *written* undertaking (*Rule* 60).

Where service is required, the writ is to be served in the manner in which service was effected, where that is practicable; where personal service is required, if it be made to appear to Court or Judge that plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make an order for *substituted* or other serice, or for substitution of notice for service (*Rule* 34).

Every application for substituted service under the last-mentioned rule must be supported by affidavit, setting forth the grounds upon which the application is made (*Rule* 34).

The person serving writ is, within 3 days thereafter, to indorse on the writ the day of the week and month of such service; otherwise the plaintiff will not be entitled in case of non-appearance to proceed by default without leave of a Judge, costs of obtaining leave to be in no event charged against defendant; and every affidavit of service of such writ is to mention the day on which such indorsement was made (*Rule* 44).

Notice in lieu of service is to be given in the same manner as writ is served (*Rule* 49).

Service on married woman. A married woman is to be served in the same manner as a party to a suit not under any disability is now served, and the like proceedings may be thereupon had, and with like effect as if she were a *feme sole* (*Rule* 35).

Service on infant. When an infant, resident in Ontario, is defendant, and action is for administration or partition, or for any purpose other than the recovery of money from the infant personally, or of lands, goods or chattels, of which he is personally in possession,

SERVICE of Writ *(within the Jurisdiction)—continued.*

service on the official guardian is to be good service (*Rule* 36).

If in such case more than one infant defendant one copy only need be served (*Rule* 36 *a*).

Any person interested may move for an order appointing a guardian other than the official guardian so served (*Rule* 36 *c*).

In above excepted cases infant is to be served personally, and one copy of writ is to be posted (prepaid) to, or delivered at the office of official guardian (*Rule* 37).

Service on lunatic or person of unsound mind not so found. In these cases service on—

(*a*) The committee, or

(*b*) The person with whom such lunatic, &c., is residing, or

(*c*) The person under whose care he or she is,

shall, unless the Court or Judge otherwise orders, be deemed good service (*Rule* 38).

[In *Thorn* v. *Smith*, *W. N.* (1879) 81, service was permitted on the keeper of an asylum].

No further proceedings are to be taken against such a defendant who has no committee, until guardian is appointed (*Rule* 39).

Service on partners and other bodies. Where partners sued in name of firm, service may be on—

(*a*) Any one or more of the partners, or

(*b*) At principal place of business within Ontario, upon any person having at the time of service the control or management of the business there (*Rule* 40).

When one person carrying on business in the name of

SERVICE of Writ (*within the Jurisdiction*)—*continued.*

a firm, is sued in the firm name, service may be made at the principal place of business, as above (*Rule* 41).

Service on corporations, societies, &c. Whenever by any Statute provision is made for service of any writ, bill, petition, or other process, upon any corporation, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ may be served in the manner so provided (*Rule* 42).

[As to service on **corporations**. (See *R. S. O., cap.* 50, *s.* 21, 22).

As to service on **joint stock companies** (*R. S. O. cap.* 149, *s.* 43, *and cap.* 150, *s.* 60).

Service in actions to recover land. In case of vacant possession, when it cannot otherwise be effected, service may be made by posting a copy of the writ on the door of the dwelling-house or other conspicuous part of the property (*Rule* 43).

SERVICE of Writ (*out of Jurisdiction*).

Service of a writ, or notice, out of Ontario may be allowed by the Court or a Judge—

1. Whenever the whole or any part of the subject matter of the action is land, or stock, or other property, situate within Ontario, or any act, deed, will, or thing affecting such land, stock or property, and

2. Whenever the contract, which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded, was made or entered into within Ontario, and

SERVICE of Writ (*out of Jurisdiction*)—*continued.*

3. Whenever there has been a breach within Ontario of any contract wherever made, and

4. Whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within Ontario, and

5. Whenever the action is upon a contract or judgment, though the same be not within the four already enumerated classes, but it appears to the Court or a Judge that defendant has assets in Ontario of the value of $200 liable to the judgment if recovered (*Rule* 45). [If defendant does not appear, manner of proceeding to be directed by, and claim to be proved to the satisfaction of, the Court or Judge (*Rule* 45)].

Existing jurisdiction to direct that service in any other manner, may be good service is not interfered with (*Rule* 47).

It is not to be necessary before serving the writ, or notice, to apply to allow the service; the application is to be made after service, and proof given to the satisfaction of the Court or a Judge that the service was duly made and that the case was a proper one for service out of the Province under preceding rules (*Rule* 48).

Notice in lieu of service is to be given in the manner in which writs are served (*Rule* 49).

The statement of claim is to be served with the writ (*Rule* 46*d*).

Time for defending. When a defendant is served out of Ontario he is to have the following time after service to appear and deliver his defence, both proceedings to be taken within the time named:—

SERVICE of Writ (*out of Jurisdiction*)—*continued.*

1. *Six* weeks if served within
   - (*a*) The United States, or
   - (*b*) Any part of Canada other than
     - (i) Ontario,
     - (ii) Manitoba,
     - (iii) Keewatin,
     - (iv) N. W. Territories, or
     - (v) British Columbia.

2. *Eight* weeks if served within
   - (*a*) The United Kingdom,
     (Including the Isle of Man and Channel Islands)
   - (*b*) Manitoba,
   - (*c*) Keewatin,
   - (*d*) N. W. Territories,
   - (*e*) British Columbia, or
   - (*f*) Newfoundland.

3. *Twelve* weeks if served elsewhere.

[Existing jurisdiction to direct that time for defending is to be other than that above named is not interfered with (*Rule* 47).]

RENEWAL of Writ.

No original writ is to be in force for more than 12 months from the day of the date thereof, including the day of such date (*Rule* 31).

[The months are calendar months (*Rule* 454), and run from the date of the writ (*Re Jones, Eyre* v. *Cox*, 24 W. R. 317).]

If any defendant not served, the plaintiff may *before the expiration of the 12 months*, apply to a Judge for

RENEWAL of Writ—*continued.*

leave to serve the writ after and notwithstanding the lapse of the said period (*Rule* 31);

Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the service shall be good if made within *12* months from date of the order; and so from time to time during the currency of the further period allowed (*Rule* 31, *a*).

Writ to be renewed by being marked with date of day, month and year of such renewal (*Rule* 31, *b*).

A writ of summons so renewed shall be available to prevent the operation of any statute whereby the time for the commencement of the action is limited, and for all other purposes, from the date of the issuing of the original writ (*Rule* 31, *c*).

The production of a writ purporting to have been so renewed, in manner aforesaid, is to be sufficient evidence *prima facie* of its having been renewed, and of the commencement of the action as of the date of the issue of the writ in the manner provided (*Rule* 32).

APPEARANCE.

The defendant is to enter an appearance in the office from which the writ issued by delivering to the proper officer a memorandum in writing (*Rule* 51)

If two or more defendants in the same action shall appear by the same solicitor, and at the same time, the names of all the defendants so appearing are to be inserted in one memorandum (*Rule* 59).

Time for appearance. A defendant may appear at any time before judgment (*Rule* 61).

If the defendant appear at any time after the time limited for appearance, he must *on the same day*—

APPEARANCE—*continued.*

(a) Give notice thereof to the plaintiff's solicitor, or to

(b) The plaintiff, if plaintiff sues in person.

And he shall not, unless the Court or Judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ; and if the defendant appears after the time appointed by the writ, and omits to give notice thereof, the plaintiff may proceed as in case of non-appearance (*Rule* 61).

[**Undertaking to appear.** No service of the writ is required when defendant by his solicitor accepts service and undertakes to enter an appearance (*Rule* 33); and a solicitor not entering an appearance in pursuance of his *written* undertaking, is liable to attachment (*Rule* 60).]

The memorandum of appearance is—

(a) To be in writing,

(b) To bear date on the day of its delivery,

(c) To contain the name and place of business of defendant's solicitor, or

(d) To state that defendant appears in person (*Rule* 51).

A defendant appearing in person, is to state in the memorandum his address; and if he resides more than 2 miles from the office from which writ was issued he shall state in the memorandum a place to be called his *address for service*, which shall not be more than 2 miles from such office (*Rule* 53).

The memorandum is not to be received unless it contains the address of the solicitor or defendant as above required (*Rule* 54).

APPEARANCE—*continued.*

If such address be illusory or fictitious, the appearance may be set aside by the Court or Judge on the application of the plaintiff; and the plaintiff may be permitted by the Court or a Judge to proceed by posting up the proceedings in the office from which the writ was issued (*Rule* 54).

Where defendant does not require delivery of a statement of claim he shall state so in his appearance, and in that case shall serve a copy thereof on the plaintiff (*Rule* 55*a*).

Appearance by partners. Where partners are sued in the name of their firm they are to appear individually in their own names; but all subsequent proceedings, nevertheless, continue in the name of the firm (*Rule* 57). And where any person carrying on business in the name of a firm, apparently consisting of more than one person, is sued in the name of the firm, he is to appear in his own name; but all subsequent proceedings continue in the name of the firm (*Rule* 58).

Appearance in actions for the recovery of land. Any person *not named as defendant* in the writ may *without leave* appear and defend, on filing with his appearance an affidavit, showing that he is in possession of the land either by himself or his tenant, and stating further, in case the possession is by his tenant, that the defendant named in the writ is his tenant (*Rule* 62) and where such affidavit is not filed may *by leave* of the Court or a Judge appear and defend on filing such an affidavit (*Rule* 63).

Any person appearing to defend *as landlord* in respect of property, whereof he is in possession in person or by his tenant, shall state in his appearance that he appears as landlord (*Rule* 64).

Where a person not named as defendant in the writ enters an appearance according to the Rules, it shall be

APPEARANCE—*continued.*

intituled in the action against the party or parties named in the writ as defendant or defendants; and the person so appearing shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action; and if no such notice is given the plaintiff may proceed as in case of non-appearance (*Rule* 65).

Any person appearing to a writ shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the cause (*Rule* 66).

[The notice is to be served within four days after appearance upon the solicitor whose name is endorsed on the writ, if any; and if none, then filed in the proper office; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole.]

Appearance in other cases. Any person may limit his defence to the question of amount to which plaintiff is entitled, by stating in his appearance or by notice served within 4 days thereafter that he disputes only the amount claimed; no further defence need be filed, and the plaintiff is to proceed as if a defence had been filed disputing amount of claim (*Rule* 68).

APPLICATION for Disclosure by Solicitors or Plaintiffs.

Every solicitor whose name is signed or endorsed on the writ shall, on demand *in writing* by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity;

APPLICATION for Disclosure by Solicitors or Plaintiffs—*continued.*

if he answers in affirmative, then if directed by Court or Judge he shall, under penalty of contempt, disclose in writing within a limited time the profession or occupation and place of abode of plaintiff, and if the solicitor shall declare that the writ was not so issued by him, all proceedings are to be stayed, and no further proceedings are to be taken thereupon without leave of Court or Judge (*Rule* 29).

When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitor shall, on demand in writing by or on behalf of any defendant, declare the names and places of residence of all the persons constituting the firm, and if the plaintiffs do not comply with such demand, all proceedings may be stayed on application to Court or Judge on such terms as may be directed. When the names of the partners are declared, the proceedings continue in the name of the firm (*Rule* 30).

AMENDMENT of Writ.

The Court or Judge may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner and on such terms as may seem just (*Rule* 10).

Should the defendant fail to enter an appearance to the writ, the next step to be taken by the plaintiff is to sign—

JUDGMENT in Default of Appearance.

The nature of the judgment and the mode and time of signing depend upon the nature of the indorsement upon the writ and other circumstances, which are as follows :—

JUDGMENT in Default of Appearance—*continued.*

1. Where the writ is "specially indorsed" for debt or liquidated demand. Where the defendant fails to appear, before taking proceedings for default, the plaintiff must file an affidavit of service, or of notice in lieu of service, or the solicitor's undertaking verified by affidavit, as the case may be (*Rule* 71).

Where the defendant does not appear, the plaintiff may sign final judgment for any sum not exceeding that indorsed on the writ with interest at the rate specified (if any) to the date of judgment, and a sum for costs and may issue execution at the expiration of 8 days from the last day for appearance (*Rule* 72).

Where there are several defendants, and one or more of them appear to the writ and others do not appear, plaintiff may enter final judgment against those not appearing, and may issue execution without prejudice to his right to proceed against those who have appeared (*Rule* 73).

Setting aside judgment. It shall be lawful for the Court or Judge to set aside or vary such judgment upon such terms as may seem just (*Rule* 72).

[And under *Rule* 214, *any* judgment by default may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or a Judge may think fit].

2. Where plaintiff's claim is for a debt or liquidated demand, the writ not being specially indorsed. In this case, should the defendant fail to appear, no statement of claim need be delivered, but the plaintiff may file—

(*a*) An affidavit of service of the writ, or of notice in lieu of service, as the case may be, and

JUDGMENT in Default of Appearance—*continued.*

(*b*) A statement of the particulars of his claim in respect of the causes of action stated in the indorsement on the writ,

And he may, after eight days, enter **final judgment** for the amount shown in the statement, and costs to be taxed, provided that the amount be not more than the sum indorsed on writ besides costs (*Rule* 74).

[The extra costs of such statement are to be in the discretion of the taxing officer (*Rule* 74)].

3. Where plaintiff's claim is for detention of goods and pecuniary damages, or either. No statement of claim need be delivered, but an affidavit of service must be filed, and plaintiff may enter **interlocutory judgment,** and the value of the goods and damages, or of either, shall be assessed as hitherto, or at the County Court of the County in which the action is brought, if the solicitors for all parties reside in such County (*Rule* 75).

[But the Court or a Judge may order that the damages shall be ascertained in any other way in which any question arising in an action may be tried (*Rule* 75)].

4. Where writ specially indorsed for an account. Before taking steps in default, the plaintiff must file affidavit of service, or of notice in lieu of service, or undertaking of defendant's solicitor verified by affidavit (*Rule* 71).

In default of appearance, unless the defendant by affidavit or otherwise satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made (*Rule* 86).

[The application for such order as above mentioned is to be made on notice, supported by an affi

JUDGMENT in Default of Appearance—*continued.*

davit on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for appearing has expired (*Rule* 87)].

[Rules 86 and 87 are not to prevent orders being made for administration or partition in manner provided by the Chancery orders (*Rule* 88).]

5. In other cases of account. In cases in which rules above referred to do not entitle plaintiff to judgment, plaintiff may proceed *after appearance* as where writ endorsed specially for an account (*Rule* 86).

6. In action for the recovery of land. If no appearance be entered, or if an appearance be entered, but the defence be limited to part only, the plaintiff shall be at liberty to enter judgment that the person whose title is asserted in the writ shall recover possession of the land (*Rule* 76).

[The plaintiff must file the affidavit of service, &c. required by *Rule* 71.]

Where the plaintiff has indorsed a claim for **mesne profits, arrears of rent or damages for breach of contract** upon a writ for recovery of land, he may enter judgment as above for the land and may proceed as above as to other claim (*Rule* 77).

7. In action for foreclosure, or redemption of mortgage, or for sale of mortgaged premises, or for administration of estate or partition. Plaintiff entitled to judgment as provided by present practice of Court of Chancery (*Rules* 78, 79).

WHERE the Defendant is under Disability.

The plaintiff, upon default of appearance, may apply to the Court or Judge for an order that the official

WHERE the Defendant is under Disability—*continued.*

guardian or some other proper person be assigned guardian, to such defendant where such defendant is—

(a) A person of unsound mind not so found by inquisition (*Rule* 69).

But no such order is to be made unless it appears on the hearing of such application—

1. That the writ of summons was duly served, and—
2. That notice of such application was—
   after the time allowed for appearance, and at least 6 clear days before the day in such notice named for hearing the application,
   served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ (*Rule* 69).

Where such defendant is an infant who has been served with writ otherwise than by the same being served on official guardian if no guardian *ad litem* is appointed within 7 days after expiration of time for appearance, plaintiff may serve notice of particulars of his claim on official guardian; whereupon official guardian shall be guardian *ad litem* of infant unless Court otherwise orders (*Rule* 70).

JUDGMENT under Ord. 10.

Should the defendant appear to the writ specially endorsed under *Rule* 14, the plaintiff when not entitled to judgment as above stated may—

(a) On affidavit made by himself (or by any one who can swear positively to the debt or cause of action), verifying the cause of action

JUDGMENT under Order 10—*continued.*

and stating that in his belief there is no defence—

Call on defendant to shew cause why the plaintiff should not be at liberty to sign **final judgment** for the amount endorsed on the writ, with interest, if any, and costs (*Rule* 80).

The application to enter judgment under the preceeding rule is to be made by notice returnable not less than two clear days after service (*Rule* 81).

[The affidavit verifying the cause of action and stating that in the belief of the deponent there is no defence to the action, is filed, and thereupon a notice accompanied with a copy of the affidavit is served (*Rule* 80).]

DISCLOSURE of Facts entitling Defendant to defend.

The defendant will be entitled to defend, if he, by affidavit *or otherwise*—

(a) Satisfies the Court or Judge that he has a good defence to the action on the merits, or

(b) Discloses such facts as the Court or Judge may think sufficient to entitle him to be permitted to defend (*Rule* 80).

Should he fail to satisfy the Court or Judge as above, an order may be made empowering the plaintiff to sign judgment (*Rule* 80).

SHEWING Cause against Application.

The defendant may shew cause against such application—

1. By offering to pay into Court the sum indorsed on the writ, or
2. By affidavit (*Rule* 82).

SHEWING Cause against Application—*continued.*

Such affidavit is to state whether the defence alleged by him goes to the whole, or part only, and if so to what part of the plaintiff's claim, and the Judge may, if he think fit—

(a) Order defendant to attend and be examined upon oath, or

(b) To produce any books or documents, or copies of, or extracts therefrom (*Rule* 82).

If it appear—

(a) That defence applies to only part of plaintiff's claim, or

(b) That any part of the claim is admitted to be due,

the plaintiff shall have judgment for such parts of his claim as the defence does not apply to, or as is admitted to be due, and defendant may be allowed to defend as to the residue (*Rule* 83).

But such judgment may be subject to terms, if any :—

1. As to suspending execution, or,
2. Payment of any amount levied, or part, into Court by sheriff,
3. The taxation of costs,

or otherwise, as the Judge may think fit (*Rule* 83).

If it appears to the Judge that any defendant has a good defence, or ought to be permitted to defend, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution without prejudice to his right to proceed against the former (*Rule* 84).

Leave to defend. Leave to defend may be given—

1. Unconditionally; or,

2. Subject to such terms as to giving security or otherwise as the Court or a Judge may think fit (*Rule* 85).

SETTING aside Judgment by Default.

It should be remembered that under *Rule* 214, "any judgment by default, under any of the rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or a Judge may think fit." And lapse of time will be no bar to an application to set it aside, where no irreparable wrong will be caused to a plaintiff (*Atwood* v. *Chichester*, 3 *Q. B. D.* 722).

STATEMENT of Claim.

Presuming that the defendant has appeared, and there has been no judgment under Order 10 against him, the plaintiff's next step is to deliver his claim [which includes filing it (*Rule* 150).]

Unless the defendant at the time of appearing, states that he does not require a statement of claim, the plaintiff must, within such time and in such manner as is prescribed deliver to the defendant a statement of claim and of the relief or remedy which he claims (*Rule* 126).

And *Rule* 158 provides that—

If the defendant shall not state that he does not require the delivery of a statement of claim the plaintiff shall deliver it within 3 months from the time of the defendant's appearance, *unless otherwise ordered by the Court or a Judge* (*Rule* 158*a*.)

STATEMENT of Claim—*continued.*

If the defendant shall state that he does not require such delivery, plaintiff shall file copy of writ with all endorsements within same time (*Rule* 158*b*).

The plaintiff may, if he think fit—

(a) With the writ or notice in lieu of writ, or

(b) At any time afterwards, either before or after appearance,

(*and although the defendant may have appeared and stated that he does not require delivery of a statement of claim*)

deliver a statement of claim. *Provided*, that in no case shall a statement be delivered more than 3 months after the time of appearance, *unless otherwise ordered by the Court or a Judge* (*Rule* 158*c*).

When a plaintiff delivers a statement of claim without being required to do so, the Court or a Judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper (*Rule* 158*d*).

The taxing officer shall have the same duty if no such order is made (*Rule* 158*e*).

What to state. Every statement of claim shall state *specifically*—

(1) The relief which the plaintiff claims

(a) Either simply, or

(b) In the alternative, and

(2) May also ask for *general* relief (*Rule* 133).

If the Plaintiff's claim be for discovery only, the statement shall show it (*Rule* 133).

Where the plaintiff seeks relief in respect of *several distinct claims*, or causes of complaint founded upon

STATEMENT of Claim—*continued.*

separate and distinct facts, they shall be stated, as far as may be, separately and distinctly (*Rule* 134).

Stating place of trial in the claim. There is to be no local venue except in ejectment, but plaintiff shall in his statement of claim name the county town where he proposes to try (*Rule* 254).

Notice in lieu of claim where writ specially indorsed. Where the writ is specially endorsed, and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to file a copy of the writ, and special endorsement, if not filed already, and to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement on the writ,

Unless the Court or Judge shall order him to deliver a further statement (*Rule* 159).

Such further statement is to be delivered within such time as by such Order shall be directed, and if no time be so limited then within the time prescribed by *Rule* 158 (viz. 3 months after the appearance) (*Rule* 159).

[The notice may be either written or printed, or partly written and partly printed, and may be in Form 16 of appendix (*Rule* 159*a*).]

DISMISSAL for Want of Prosecution.

If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a Judge to dismiss the action with costs for want of prosecution, and on the hearing of the application the Court or Judge may, if no statement has been delivered,

DISMISSAL for want of Prosecution—*continued.*

(a) Order the action to be dismissed, or

(b) Make such other Order on such terms as to them shall seem just (*Rule* 203).

DEFENDANT'S Application for Particulars.

The application for particulars is made by motion. [*See* Maclennan's Judicature Act (p. 98)].

JUDGMENT for Want of Defence.

As in the case of judgment in default of appearance, so, where the defendant omits to deliver any statement of defence, the nature of and time for entering judgment depend upon the nature of the plaintiff's claim, and the form of endorsement on the writ.

1. Where plaintiff claims a debt or liquidated demand. Here the plaintiff may enter *final* judgment for the amount claimed with costs, if the defendant does not within the time allowed for that purpose deliver a defence or demurrer (*Rule* 204).

[The defence is to be delivered within 8 days from delivery of statement of claim, or from time limited for appearance, whichever shall be last (*Rule* 160).]

Where there are several defendants, and one makes default, plaintiff may enter *final* judgment against defaulting defendant, and issue execution on such judgment without prejudice to his right to proceed with his action against the others (*Rule* 205).

When the plaintiff's claim is for:—

1. A debt or liquidated demand, and also
2. For detention of goods, and pecuniary damages, or pecuniary damages only,

JUDGMENT for Want of Defence—*continued.*

And the defendant makes default, the plaintiff may enter *final* judgment for the debt or liquidated demand, and also enter *interlocutory* judgment for the value of the goods and the damages, or the damages only unless the Court or Judge shall otherwise direct, and proceed under *Rule* 206 (*Rule* 208.)

2. Where claim is for detention of goods and pecuniary damages, or either of them. In such case the plaintiff may enter *interlocutory* judgment, if defendant does not deliver defence or demurrer within the time limited for that purpose (*Rule* 206). And the value of the goods, and the damages, or the damages only, as the case may be, shall be assessed as hitherto (*Rule* 206). But the Court or a Judge may order the value and amount of damages, or either, to be ascertained in any other way in which any question arising in an action may be tried (*Rule* 206).

Where there are several defendants, and one makes default, plaintiff may enter *interlocutory* judgment against him, and proceed with his action against the others (*Rule* 207).

And in such case, damages against the defaulting defendant shall be assessed at the same time with the trial of the action or issue therein against the other defendants, unless the Court or a Judge shall otherwise direct (*Rule* 207).

3. In actions for the recovery of land. The plaintiff may enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, with his costs (*Rule* 209).

And where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, plaintiff may enter judgment against the de-

JUDGMENT for Want of Defence—*continued.*

faulting defendant or defendants, and proceed as mentioned in *Rules* 206 and 207 (when claim is for pecuniary damages) (*Rule* 210).

4. In all other actions. The plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court considers the plaintiff entitled to (*Rule* 211).

Where there are *several* defendants and one makes default, plaintiff may:—

1. Set the action down on motion for judgment against the defaulting defendant; or may
2. Set it down against him when it is entered for trial, or set down on motion for judgment against the other defendants (*Rule* 21).

[In case of issues between parties other than plaintiff and defendant, if any party makes default in delivering any pleading, the opposite party may apply to the Court for such judgment as on the pleadings he appears to be entitled to, and the Court may—

1. Order judgment to be entered accordingly, or
2. Make such other Order as may be necessary to do complete justice between the parties (*Rule* 213).]

[As we have before observed under *Rule* 214, "Any judgment by default, under any of the rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise, as such Court or Judge may think fit."]

PAYMENT into Court before Defence.

Where any action is brought to recover—

(a) A debt, or

(b) Damages,

PAYMENT into Court before Defence—*continued.*

Any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein (*Rule* 215).

Where payment is made before defence, the defendant shall serve upon plaintiff a notice (Form 21) that he has paid in such money, and in respect of what claim (*Rule* 216).

PAYMENT out to Plaintiff.

Money paid into Court as aforesaid may, unless otherwise ordered by a Judge, be paid out to the plaintiff or to his solicitor on the written authority of the plaintiff. No affidavit is to be necessary to verify the plaintiff's signature to such authority, unless specially required by the officers of the Court, or one of them whose duty it is to sign or countersign the cheque (*Rule* 217).

The plaintiff, if payment into Court is made before delivering a defence, may, within 4 days after receipt of notice of such payment, or if such payment is first stated in a defence delivered, then may before reply accept the same in satisfaction of the causes of action in respect of which it is paid in: in which case he shall give notice thereof to the defendant (Form 22): and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and in case of non-payment within 48 hours to sign judgment for his costs so taxed (*Rule* 218).

STATEMENT of Defence.

The defendant shall, within such time and in such manner as hereinafter described, file and deliver to the plaintiff a statement of his—

(a) Defence ;

(b) Set-off ; or

(c) Counter-claim ;

(if any). Such statement to be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire, at the instance of any party, into any unnecessary prolixity, and order the costs thereof to be borne by the party chargeable with the same. The taxing officer shall have the like duty where no such Order is made (*Rule* 126*a*, *c*, *d*), (*Rule* 150).

Time for delivery of defence. Where a statement of claim is delivered to defendant, he must deliver his defence within 8 days—

(a) From the delivery of the claim, or

(b) From the time limited for appearance,

whichever shall be last, unless such time is extended by the Court or a Judge (*Rule* 160).

[**A demurrer** is included in a defence under the above rule (*see Rule* 191). And it is decided that where a defendant has obtained an order for further time to defend, he may demur within such time (*Hodges* v. *Hodges*, 2 *Ch. Div.* 112).]

No pleadings are to be amended or delivered in the Long Vacation, unless directed by Court or a Judge (*Rule* 459).

Where the defendant appears to the action, and has stated that he does not require a statement of claim, and no statement of claim has been delivered to him, he may

STATEMENT of Defence—*continued.*

deliver a defence at any time within 8 days after his appearance, unless time extended (*Rule* 161),

Where leave has been given to a defendant to defend under *Rule* 80, he must deliver his defence (if any)

(a) Within such time as is limited by the Order giving leave;

or, if no time is thereby limited, then

(b) Within 8 days after the Order (*Rule* 162).

Every defendant to an action need not be interested—

(a) As to all the relief thereby prayed for, or

(b) As to every cause of action included therein;

but the Court or a Judge may make such Order as may appear just—

(1) To prevent any defendant from being embarrassed; or

(2) Put to expense by having to attend proceedings in which he may have no interest (*Rule* 92).

Where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly (*Rule* 134).

In actions for recovery of land—*Defendant in possession*—

(a) By himself, or

(b) By his tenant,

need not plead his title, but it shall be sufficient to state that he is so in possession, *unless* his defence depends on—

(a) An equitable estate or right; or

(b) He claims relief on any equitable ground against any right or title asserted by plaintiff.

And he may, nevertheless, rely upon any ground of

STATEMENT of Defence—*continued.*

defence which he can prove, except in the cases hereinbefore mentioned (*Rule* 144).

"Not guilty by statute." The defendant may still plead "not guilty by statute." And this defence is to have the same effect as formerly. *Provided* that if the defendant so plead he shall not plead any other defence without leave of the Court or a Judge (*Rule* 145).

SET-OFF, or Counter-claim.

A defendant may set off, or set up by way of *counter-claim*, any right or claim, whether such set-off or counter-claim sound in damages or not (*Rule* 127).

Such set-off, or counter-claim, is to have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce final judgment in the same action, both on the original and on the cross claim (*Rule* 127*a*).

[This power of setting up a set-off, or counter-claim, is intended to avoid cross actions, "so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided" (*O. J. Act*, 1881, *s.* 16, *sub-sect.* 8). It is not essential to a good counter-claim that it should disclose a claim equal in amount to the plaintiff's claim (*Mostyn* v. *West Mostyn Coal and Iron Co.*, 1 C. P. Div. 145).]

Every counter-claim made, or relief claimed by the defendant, is to state specifically,

(1) The relief which he claims—

(a) Either simply, or

(b) In the alternative.

SET-OFF, or Counter Claim—*continued.*

(2) And may also ask for *general* relief (*Rule* 133).

Where defendant relies upon several distinct grounds of set-off, or counter-claim, founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly (*Rule* 134).

Judgment for defendant on set-off or counter-claim. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favor of the defendant,

(a) Give judgment for the defendant for such balance; or

(b) Adjudge to the defendant such relief as he may be entitled to upon the merits of the case (*Rule* 169).

[The "balance" here mentioned means the balance which results from the hearing of the action (*Rolfe* v. *Maclaren*, 3 *Ch. Div.* 106).]

Questions between defendant and third parties. Where a defendant sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action (*Rule* 164).

Under the above rule the defendant is to deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff (*Rule* 164).

Where any such third person is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, to be endorsed with Form 19, and such service shall be regulated by the same rules as

SET-OFF, or Counter Claim—*continued.*

are prescribed as to service of writs (*Rule* 165); and any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons (*Rule* 166).

Any person named in a defence, as a party to a counter-claim thereby made, may deliver a reply within the time (8 days) within which he might deliver a defence if it were a statement of claim (*Rule* 167).

APPLICATION by Plaintiff to exclude Set-off or Counter-claim.

On the application of the plaintiff, before trial, the Court or Judge may refuse permission to the defendant to avail himself of a set-off or counter-claim, if in the opinion of the Court or Judge—

(a) Such set-off or counter-claim cannot be conveniently disposed of in the pending action, or

(b) Ought not to be allowed (*Rule* 127*b*).

Where a defendant sets up a counter-claim, if the plaintiff, or any other person named as party to such counter-claim, contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time within 3 weeks from delivery of defendant's statement apply to the Court or a Judge for an order that such counter-claim be excluded, and the Court or a Judge may, on the hearing of such application, make such order as shall be just (*Rule* 168).

PRELIMINARY Examination of Parties.

(*See* R. S. O. cap. 50, *S.* 156 et seq., G. O. Chy, 138.)

If examining party desires examination to be taken

PRELIMINARY Examination of Parties—*continued.*

in shorthand, he may have it taken before any examiner residing at the place of examination competent to take evidence in shorthand, unless otherwise ordered by the Court or a Judge (*Rule* 219).

A person for whose immediate benefit a suit is prosecuted or defended, is to be regarded as a party for the purpose of examination (*Rule* 224).

Persons who have ceased to be officers of a corporation may be examined in the same manner as existing officers (*Rule* 227).

For all purposes of and incident to examination, the position of a third party served by a defendant under *Rule* 107, as between him and such defendant, shall be the same as between him as a defendant and such defendant as a plaintiff (*Rule* 223).

The time for taking out an order for examination shall be after the party served has delivered a reply, or where the application is on behalf of a defendant serving a third party under *Rule* 107, the time shall be after the time for delivering reply has expired (*Rule* 223).

Any party may at the trial use in evidence any part of the examination of the opposite parties; but the Judge may look at the whole examination and if he shall be of opinion that any other part is so connected with the part to be so used that the last-mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence (*Rule* 239).

Costs of examination are to be costs in the cause, but the Court or Judge in adjusting the costs of the action shall, at the instance of any party, inquire or cause inquiry to be made into the propriety of having made such examination. And if it is the opinion of the Court or Judge or of the Taxing Master, that such examination has been had—

PRELIMINARY Examination of Parties—*continued.*

(a) Unreasonably,

(b) Vexatiously, or

(c) At unnecessary length,

the costs occasioned by the examination shall be borne in whole or in part by the party in fault (*Rule* 220).

DISCOVERY as to Documents.

The Court or a Judge may, *at any time during the action or proceeding*, order the production by any party, upon oath, of such of the documents in his possession or power relating to any matter in question in such action, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just (*Rule* 221).

[A plaintiff is not entitled to an order for discovery before statement of claim, except under very special circumstances (*Cashin* v. *Cradock*, 2 *Ch. D.* 140); nor is the defendant before delivery of defence.]

Any party may, after the close of the proceedings, (or where the application is on plaintiff's behalf after the time for delivering defence of any party has expired), obtain an order on præcipe directing the adverse party within 10 days after service to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action, and to produce and deposit them with the proper officer for the usual purposes, without further notice (*Rule* 222).

For all purposes of and incident to production the position of a third party served by a defendant, under *Rule* 107, as between him and such defendant, shall be

DISCOVERY as to Documents—*continued.*

the same as between him as a defendant and such defendant as a plaintiff (*Rule* 223);

The time for taking out an order for production shall be after the party so served has delivered a reply, or where the application is on behalf of a defendant so serving such third party, the time shall be after the time for delivering reply has expired (*Rule* 223).

Where corporation aggregate is required to produce affidavit shall be made by one of the officers (*Rule* 225).

The deponent shall be subject to cross-examination (*Rule* 226).

Affidavit of documents. The affidavit is to specify which (if any) of the documents the party objects to produce (*Rule* 228.)

[*See* form of affidavit, Forms 34, 35.]

Notice to produce. Every party to an action or other proceeding shall be entitled—

(a) At any time before the hearing, or

(b) At the hearing thereof,

by notice in writing, to give notice to any other party, in whose—

1. Pleadings, or

2. Affidavits,

reference is made to any document, to produce such document for the inspection of any party giving such notice, or of his solicitor, and to permit him to take copies thereof (*Rule* 229).

[No allowance of costs is to be made for any order or notice to produce or any inspection, unless the Taxing Master is satisfied that there was good reason for such order, notice or inspection (*Rule* 230).]

[*See* form of notice, Forms 23.]

DISCOVERY as to Documents—*continued.*

The party to whom such notice is given shall—

(a) Within two days from its receipt
(if all the documents therein referred to are set forth in his affidavit),

(b) Or within 4 days
(if any of the documents therein referred to are **not** so set forth in the affidavit,)

deliver to the party giving the same a notice stating a time—

(c) Within 3 days from the delivery thereof, at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating—

1. Which (if any) he objects to produce, and
2. On what ground (*Rule* 232).

[*See* form of notice, Forms 25.]

Any party not complying with notice to produce, shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding unless he satisfies the Court:—

(a) That such document relates only to his own title, he being a defendant to the action; or

(b) That he has some other sufficient cause for not complying with such notice (*Rule* 229.)

If the party served with notice under *Rule* 231 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a Judge for an Order for inspection (*Rule* 233).

Order for inspection. Every application for an Order for inspection shall be to a Judge, and, except in the case of—

(a) Documents referred to in the pleadings or

DISCOVERY as to Documents—*continued.*

affidavits of the party against whom the application is made; or

(b) Disclosed in his affidavit of documents,

such application shall be founded upon an affidavit, shewing—

1. Of what documents inspection is sought:
2. That the party applying is entitled to inspect them; and
3. That they are in the possession or power of the other party (*Rule* 234).

[This Rule does not state that such affidavit is to be made by the party or his solicitor.]

If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection (*Rule* 235).

If a party fail to obey an Order for discovery or inspection he is liable on the application of the party who obtained the Order, to—

1. Attachment; and also,
2. If a *plaintiff*, to have his action dismissed for want of prosecution; and
3. If a *defendant*, to have his defence struck out, and to be placed in the same position as if he had not defended (*Rule* 236).

Service of the Order on the solicitor is to be sufficient service to found an application for attachment for dis-

DISCOVERY as to Documents—*continued.*

obedience of it. The party moved against may shew that he has had no notice or knowledge of the Order (*Rule* 237).

[A solicitor who neglects, without reasonable excuse, to notify his client of such Order shall be liable to attachment (*Rule* 238).]

AMENDMENT of Statement of Claim, Defence or Reply.

1. By leave. The Court or Judge may at any stage of the proceedings—

1. Allow either party to alter his statement of claim, defence, or reply; or
2. May order to be struck out or amended any matter
   (a) Which may be scandalous, or
   (b) Which may tend to prejudice, embarrass, or delay the fair trial of the action (*Rule* 178).

And all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties (*Rule* 178).

2. Amendment of claim without leave. The plaintiff may, without any leave, amend his statement of claim once before the expiration of the time limited for reply, and before replying; or where no defence delivered, at any time before the expiration of 4 weeks from the appearance of the defendant who shall have last appeared (*Rule* 179).

3. Amendment of set-off or counter-claim without leave. A defendant who has set up in his defence any set-off or counter-claim may, *without any leave*, amend such set-off or counter-claim—

AMENDMENT of Statement of Claim, Defence or Reply—*cont.*

1. At any time before the expiration of the time allowed him for pleading to the reply and before pleading thereto; or,
2. *In case there be no reply,* then at any time before the expiration of twenty-eight days from the filing of his defence (*Rule* 180).

AMENDMENT generally.

Disallowance of amendment. Where any party has amended his pleading under *Rules* 179-180, the opposite party may, within 8 days after the delivery to him of the amended pleading, apply to the Court or a Judge, to disallow the amendment, or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just (*Rule* 181).

Amendment after amendment by other party without leave. Where any party has amended his pleading under *Rules* 179-180, the other party may without leave amend his former pleading within 4 days after delivery of such amended pleading, or he may apply to the Court or a Judge for leave to amend his former pleading within such time and upon such terms as may seem just (*Rule* 182).

Amendment by consent. Any party may amend his pleading at any time without order on filing a written consent of the opposite party or his solicitor (*Rule* 183).

In all other cases of amendment not provided for by the preceding rules, application for leave to amend any pleading may be made by either party—

(a) To the Court; or

(b) A Judge in Chambers; or

AMENDMENT Generally—*continued.*

(c) To the Judge at the trial;

and such amendment may be allowed upon such terms as to costs or otherwise as may seem just (*Rule* 184).

If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same (a) within the time limited for that purpose by the order, or (b) if no time is thereby limited, then within 14 days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such 14 days, become *ipso facto* void, unless the time is extended by the Court or a Judge (*Rule* 185).

A pleading may be amended by written alterations (in ink of a different colour from that originally used, 187*a*) in the copies filed and served, and by additions on paper to be interleaved therewith, if necessary, unless the amendments require the insertion of more than 200 words in any place, or are so numerous or of such a nature that the making them would render the copies difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print or fresh copy of the pleading as amended (*Rule* 186).

Such amended pleading is to be delivered to the opposite party within the time allowed for amendment (*Rule* 188).

[Delivery includes filing (*Rule* 150).]

REPLY.

The plaintiff is to deliver his reply within 3 weeks after the delivery of—

(a) The defence, or

(b) The last of the defences,

unless the time is extended by a Court or a Judge (*Rule* 173).

REPLY—*continued.*

[**A Demurrer** is included in a reply under the above rule, *see Rule* 191.]

No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of a Court or a Judge, and then upon such terms as the Court or Judge shall think fit (*Rule* 174).

Subject to *Rule* 174, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time is extended by the Court or a Judge (*Rule* 175).

DEMURRER.

Any party may demur—

(a) To any pleading of the opposite party, or

(b) To any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or as the case may be

on the ground that the facts alleged therein do not shew—(a) Any cause of action, or

(b) Ground of defence,

to a claim or any part thereof, or set-off, or counter-claim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring (*Rule* 189).

A demurrer shall be delivered in the same manner and within the same time as any other pleading in the action (*Rule* 191).

Demurrer shall state specifically—

1. Whether it is to the whole or part, and if so what part, of the pleading of the opposite party;
2. Some ground in law for the demurrer;

DEMURRER—*continued.*

but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated (*Rule* 190). The Court or Judge may set aside such demurrer with costs, if

(a) There is no ground; or

(b) Only a frivolous ground stated (*Rule* 190.)

If the defendant wishes to demur to part of a claim, and put in defence to the other part, he shall combine the two in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party, he shall combine such demurrer and other pleading (*Rule* 192).

Either party may without leave plead and demur to the same pleading at the same time by filing his affidavit

(1) Distinctly denying some material statement in such pleading; or

(2) Stating that the several matters sought to be pleaded in confession and avoidance are respectively true in substance and in fact;

and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law (*Rule* 193).

The affidavit is to be annexed to the plea and demurrer filed, and a copy of the affidavit is to be served with the plea and demurrer (*Rule* 193).

If the party demurring wishes to plead as well as demur to the matter demurred to, without filing such affidavit, he may, before demurring, apply to the Court or a Judge for an order to do so, on such affidavit as now required in the Superior Courts of Law (*Rule* 194).

And the Court or Judge, if satisfied that there is reasonable ground for the demurrer—

DEMURRER—*continued.*

(a) May make an order accordingly ; or

(b) May reserve leave to him to plead after the demurrer is overruled, and may direct which issue shall be disposed of first ; or

(c) May make such other order, and upon such terms, as may be just (*Rule* 194).

When a demurrer (either to the whole or part of a pleading) is delivered, either party may enter it for argument immediately (*Rule* 195).

The party so entering it shall, on the same day, give notice to the other party (*Rule* 195).

If the demurrer—

1. Shall not be entered and notice given within 10 days after delivery ; and
2. If the party whose pleading is demurred to does not within such time serve an order for leave to amend ;

the demurrer shall be held sufficient for the same purposes, and with the same result as to costs, as if it had been allowed on argument (*Rule* 195, *a*).

While a demurrer to the *whole* or *part* of a pleading is pending, such pleading shall not be amended, unless by order of the Court or a Judge ; and no such order shall be made except on payment of the costs of the demurrer (*Rule* 196).

Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer (*Rule* 197).

If a demurrer to the whole of a statement of claim be allowed, the plaintiff shall pay to the demurring defendant the costs of the action, unless the Court shall

DEMURRER—*continued.*

otherwise order, subject to the power of the Court to allow the claim to be amended (*Rule* 198).

Where a demurrer to any pleading (or part of a pleading) is allowed in any case not within *Rule* 198 then—

(a) Subject to the power of the Court to allow an amendment :

the matter demurred to shall, as between the parties to the demurrer, be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded (*Rule* 199).

Where a demurrer is overruled the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless the Court shall otherwise direct, (*Rule* 200).

Where a demurrer is overruled, the Court may make such order, and upon such terms as to the Court shall seem right, for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to (*Rule* 201).

[Matters of law that may be raised by demurrer must not be raised on the pleadings, and if this is done, they will be struck out as embarrassing, under *Rule* 178 (*Stokes* v. *Grant*, 4 *C. P. D.* 25)].

[*See* form of demurrer, Forms 74].

CLOSE of Pleadings.

As soon as—

(a) Either party has joined issue upon any pleading of the opposite party simply, or

(b) The time for

(i) Amending the pleadings,

CLOSE of Pleadings—*continued.*

(ii) Delivering a reply, or
(iii) Subsequent pleading, or
(iv) Demurrer,

has expired, the pleadings between such parties shall be deemed to be closed without any joinder of issue being pleaded by any or either party (*Rule* 176).

ISSUES.

In any action a Judge may—

1. Direct parties to prepare issues, and
2. Settle the issues if the parties differ,

if it appears to him that the statement of claim or defence or reply does not sufficiently define the issues of fact between the parties (*Rule* 177).

APPLICATION to change Place of Trial.

There is to be no local venue except in ejectment, but plaintiff shall, in his statement of claim, name the county town in which he proposes to try, and the action shall, *unless a Judge otherwise orders*, be tried in the place so named (*Rule* 254).

Any Order of a Judge as to such place of trial may be—

(a) Discharged; or
(b) Varied;

by a Divisional Court (*Rule* 254).

[The venue in all actions will be *transitory* in future. The application should be supported by a strong affidavit, shewing the greater convenience of trying in the new place suggested.]

[An application may always be made to change the place of trial: if made by the plaintiff, it will

APPLICATION to Change Place of Trial—*continued.*

usually be allowed on his paying the costs of the application; but the application is more usually made by the defendant, and he must shew that it would be more convenient and a saving of expense, or that, by reason of local prejudice or otherwise, he cannot obtain a fair trial in the place originally proposed.]

NOTICE of Trial

At any time after the close of the pleadings, either party may give notice of trial for the next sitting of the Court, which shall be not less than 10 days thereafter, for the place so named or ordered (*Rule* 255).

Subject to the act and preceding rules, the Court or a Judge may, in any action at any time or from time to time, order—

(a) That different questions of fact be tried by different modes of trial, or

(b) That one or more questions of fact be tried before the others,

and may (1) appoint the place or places for such trial or trials,

and .. (2) may in all cases order one or more issues of fact to be tried before the others (*Rule* 256).

Every trial of any question or issue of fact by a jury shall be before a single Judge, unless such trial be specially ordered to be held before two or more Judges (*Rule* 257).

Notice of trial shall state—

(1) Whether it is for trial (a) of the action, or (b) of issues therein, and

NOTICE of Trial—*continued.*

(2) The place and day for which it is to be entered for trial (*Rule* 258).

Ten days' notice of trial shall be given, unless the party to whom it is given has consented to take short notice, which is 5 days; and 10 days' notice shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge (*Rule* 259).

And notice is to be given before entering the action for trial (*Rule* 260).

Instead of giving notice of trial, the defendant may, if the pleadings were closed 6 weeks before the sittings, apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application the Court or a Judge may (a) order the action to be dismissed accordingly, or (b) make such order and on such terms as may seem just (*Rule* 255).

ENTRY for Trial.

If notice of trial is given either party may enter the action for trial (*Rule* 261).

If both parties enter it for trial it shall be tried in the order of the plaintiff's entry (*Rule* 261).

An action is to be entered not later than the third day before the assizes or sittings, unless the Judge orders its entry afterwards on

1. Facts disclosed in affidavit, or
2. Consent of both parties (*Rule* 264).

[This rule is applicable to County Courts (*Rule* 264).]

WITHDRAWAL after Entry for Trial.

When a cause has been entered for trial, it may be withdrawn, by either plaintiff or defendant, upon pro-

WITHDRAWAL after Entry for Trial—*continued.*

ducing to the proper officer a consent in writing signed by the parties (*Rule* 171).

When the Judges consider that public convenience so requires, provision may be made for the trial at a separate time, or before another Judge of the actions from the Chancery Division (*Rule* 263).

In case such provision is made an action

1. Brought in, or
2. Assigned to

the Chancery Division is to be entered according to the present practice in Chancery (*Rule* 266).

On the day before the sittings or assizes the party entering the action for trial shall deliver to the officer one copy of the pleadings for the use of the Judge. Such copy to be certified as a true copy by the officer having charge of the pleadings, and to be indorsed with an indorsement stating whether the matter for trial is—

1. An assessment for damages,
2. An undefended issue, or
3. A defended issue (*Rules* 262, 267).

[After the action is entered for trial, the next thing is to get all ready for hearing; and in those preparations two notices are usually given, viz., a notice "to produce" documents at the trial, and a notice "to inspect and admit" documents.

[The *notice to produce* is simply a notice by either plaintiff or defendant, calling upon the opposite party to produce certain documents at the trial, and the object of giving such notice is that if the party to whom such notice is given does not produce the documents, the party giving notice may give *secondary* evidence of the contents of such documents by

WITHDRAWAL after Entry for Trial—*continued.*

copies, &c., which he would not be entitled to do, had he not given such notice.]

[*The notice to inspect and admit* is similar to the above, and is given to save the expense of calling witnesses to prove the documents at the trial.]

NOTICE to Produce and Inspect, &c.

See Rule 229, supra and *notice to produce*, supra p. 34.

[*See* form of notice, Forms 25.]

Admission of documents, &c. Each party may give notice, by his own statement or otherwise, that he admits, for the purposes of the action the truth of the case generally, or of any part of the case stated or referred to in the statement of claim, or defence, of the opposite or any other party (*Rule* 240).

Either party may call upon the other party to admit any document, saving all just exceptions (*Rule* 241); and in case of—

(a) Refusal, or

(b) Neglect to admit after such service,

the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense (*Rule* 241).

[*See* form of notice, Forms 26.]

The production of written admissions purporting to be—

NOTICE to Produce and Inspect, &c.—*continued.*

(a) In the action, and

(b) Signed by the solicitor of the party by whom, or on whose behalf they purport to be made,

shall be sufficient *prima facie* evidence of such admissions (*Rule* 243),

TRIAL.

After notice of trial, entry for trial and the notices to produce and inspect, and the admissions by either party, the subpœnas "to testify" and "to bring documents, &c., are issued and served. The only thing then is to deliver the briefs to counsel, and watch the *cause list* until the cause comes on for hearing.

The officer with whom the action is entered is to make two lists of,

1. Assessments and undefended issues, and
2. Defended issues,

entering the actions in the order in which they are entered with him.

And the Judge at the trial may call on the actions in list 1, as he finds most convenient for disposing of the business (*Rule* 267).

MODE of Trial.

Subject to rules of Court in causes and matters which at the time of passing the Judicature Act, are

(1) Within the jurisdiction of the Courts of Law the mode of trial is to be as provided for like cases in actions in the Q. B. and C. P.

And in those over which as aforesaid,

(2) The Court of Chancery had exclusive jurisdiction, the mode of trial is to be according to present practice of that Court. (*O. J. A.* 1881, *s.* 45).

FINDINGS at Trial.

At or after the trial the Judge may,

1. Direct judgment to be entered for any or either party, or
2. Adjourn the case for further consideration (*Rule* 273).

The officer present at the trial is to enter in

1. A book kept for that purpose, and
2. As an indorsement on the certified copy of pleadings delivered under *Rule* 262,
   (a) The findings of fact which the Judge directs at the trial to be entered;
   (b) The Judges' directions as to judgment, and
   (c) The certificates granted (*Rule* 274.)

[Such indorsement, or certificate of the Judge, or of such officer, is to be sufficient authority for entering judgment accordingly (*Rule* 275), *see* Forms 174.]

Every trial of any question or issue of fact by a jury shall be held before a single Judge, unless such trial be specially ordered to be held before two or more Judges (*Rule* 257).

(Non-appearance at Trial.)

Proof by Plaintiff of his Claim. If, when the action is called on, the plaintiff appears, but the defendant does not, the plaintiff may prove his claim, so far as the burden of proof lies on him (*Rule* 268).

Judgment for Defendant dismissing Action. If, when the action is called on for trial, the defendant appears and the plaintiff does not, the defendant, *if he*

NON-APPEARANCE at Trial—*continued.*

has no counter-claim, shall be entitled to judgment dismissing the action (*Rule* 269).

Proof of his Counter-claim by Defendant. If the defendant has a counter-claim, then he may prove such claim so far as the burden of proof lies on him (*Rule* 269).

[The second part of this rule is based upon the analogy of the procedure where the defendant does not appear; the plaintiff being, to all intents and purposes, the defendant to the counter-claim].

Judgment to be only on facts proved. No party is to be entitled to judgment on the ground of his pleading being true, if facts proved do not in law entitle him to judgment (*O. J. A. s.* 44).

Setting aside judgment for non-appearance at trial. Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made either at the assizes or sittings, where trial took place, or in Toronto (*Rule* 270).

Evidence omitted at trial by accident or mistake, how supplied.

Where through—

(a) Accident,

(b) Mistake, or

(c) Other cause,

Any party

(1) Omits or

(2) Fails

to prove some material fact, Judge may proceed subject to such fact being afterwards proved at such time, and

NON-APPEARANCE at Trial—*continued.*

subject to such terms as to costs and otherwise as Judge may direct (*Rule* 271).

[If it is a Jury case Judge may direct Jury to find a verdict as if such fact had been proved, and verdict shall take effect on such proof, and if not so proved, judgment is to be entered for opposite party, *unless the Court or Judge otherwise directs* (*Rule* 271)].

Rule 271 does not apply to an action for libel (*Rule* 271).

Postponement or adjournment of trial. The Judge may, if he think it expedient for the interests of justice—

(a) Postpone, or

(b) Adjourn

the trial for such time, and upon such terms (if any) as he shall think fit (*Rule* 272). Sometimes one party finds it necessary to apply for a postponement of the trial, and this is generally granted on shewing good reason for the same; but it is generally granted on the condition that the applicant shall pay the "costs of the day." This means those costs which will have to be incurred again, such as the issuing fresh subpœnas, witness and counsel fees, &c.

MOTION for New Trial.

(A.) **After trial by jury.** Where an action has been tried *by a jury* the application for a new trial shall be to a Divisional Court (*Rule* 307).

(B.) **After trial by Judge without a jury.** The former practice is not interfered with; application is therefore to be to a Divisional Court or the Court of Appeal.

MOTION for New Trial—*continued.*

Applications for new trials are to be by motion calling on the opposite party to shew cause—

(a) At the expiration of 8 days from the date of the order, or

(b) So soon after as the case can be heard,

why a new trial should not be directed (*Rule* 308).

TIME to Move.

The application is to be made within first 4 days of subsequent sittings of Divisional Court for hearing such applications.

(1) When decision is reserved and not given until such sittings, all motions respecting the trial are to be made—

(a) Within 10 days after day of decision if so many days expire in such sittings,

(b) And if not, then within first 4 days of ensuing sittings (*Rule* 309*a*).

(2) In case of a trial during sittings, such motions are to be made—

(a) Within 6 days after date of verdict if so many days expire in such sittings,

(b) And if not, then within first 4 days of ensuing sittings (*Rule* 309*b*),

[Until time for moving has expired judgment is not to be signed *unless the Judge certifies for immediate execution* (*Rule* 309).]

[The Court may enlarge the time (*Rule* 462).]

A copy of the order shall be served on the opposite party within 4 days from the time of the same being made (*Rule* 310).

A new trial shall not be granted on the ground of—

(a) Misdirection, or

TIME to Move—*continued.*

(b) Improper admission of evidence, or

(c) Improper rejection of evidence,

unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned (*Rule* 311).

If it appear to the Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may—

(1) Give final judgment as to part, and

(2) Direct a new trial as to the other part only (*Rule* 311).

A new trial may be ordered on any question in an action, whatever be the grounds for a new trial, without interfering with the finding or decision upon any other question (*Rule* 312).

An order to shew cause shall be a stay of proceedings in the action, unless the Court shall order that it shall not be so as to the whole or any part of the action (*Rule* 313).

On argument of order to shew cause counsel supporting the application shall begin and state fully the grounds of the application, and shall have the reply (*Rule* 314).

JUDGMENT (Entry of).

Except where otherwise provided by the acts or rules, the judgment is to be obtained by **motion for judgment** (*Rule* 315).

Every judgment shall be entered by the proper officer in the book to be kept for the purpose (*Rule* 325).

(*See* Forms of Judgment, Forms 147, *et seq.*)

JUDGMENT (Entry of)—*continued.*

Where judgment is pronounced, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date (*Rule* 326).

Where a judgment is not pronounced, the entry of judgment is to be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date (*Rule* 327).

The proper officer is to examine the affidavit or document produced where under the act or rules it is provided that any judgment may be entered or signed upon the filing of any affidavit, or production of any document, and—

(a) If the same be regular, and

(b) Contain all that is by law required,

he shall enter judgment accordingly (*Rule* 328).

Where by the act or rules, or otherwise any judgment may be entered—

(a) Pursuant to any order or certificate, or

(b) Return to any writ,

the production of such order or certificate, sealed with the seal of the Court, or of such return, shall be sufficient authority to the officer to enter judgment accordingly (*Rule* 329).

Nonsuit. Any judgment of nonsuit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant (*Rule* 330).

But in any case of—

(1) Mistake,

(2) Surprise,

(3) Accident, or

(4) Otherwise—

JUDGMENT (Entry of)—*continued.*

any judgment or nonsuit may be set aside on terms as to costs or otherwise (*Rule* 330).

["The reason of this practice is, that after a nonsuit which is only a default, the plaintiff has been allowed to commence the same suit again for the same cause of action, but after a verdict had for the defendant, and judgment consequent thereon, he is forever barred, unless the judgment be afterwards reversed, from attacking the defendant upon the same ground of complaint" (3 *Steph. Com., p.* 551).]

EXECUTION.

1. Judgment for recovery or payment of money. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money, of any of the Superior Courts might have been formerly enforced (*Rule* 339).

2. Judgment for payment into Court may be enforced by any mode by which such a judgment or decree might have been formerly enforced (*Rule* 340).

3. Judgment for recovery or delivery of possession of land may be enforced by writ of possession (*Rule* 341).

4. Judgment for recovery of property other than land or money may be enforced—

(1.) By writ for delivery of the property;

(2.) By writ of attachment;

(3.) By writ of sequestration (*Rule* 342).

5. Judgment to do any other act. A judgment requiring any person to—

EXECUTION—*continued.*

(a) Do any act (other than the payment of money), or

(b) To abstain from doing anything—

may be enforced by—

(1.) Writ of attachment, or

(2.) Committal (*Rule* 343).

6. Judgment against partners. Judgment against them in the name of the firm may be enforced by execution—

(a) Against any property of the partners as such.

(b) Against any person who has admitted on the pleadings that he is, or has been adjudged to be, a partner.

(c) Against any person who has been served, as a partner, with the writ, and has failed to appear (*Rule* 346).

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave to do so (*Rule* 346).

The Court or Judge may give such leave if such liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried or determined (*Rule* 346).

Where judgment is to the effect that any party is entitled to relief, subject to the fulfilment of any condition or contingency. The party so entitled may,

(a) Upon the fulfilment of the condition or contingency, and

(b) Demand made on the party against whom he is entitled to such relief,

EXECUTION—*continued.*

apply to the Court or a Judge for leave to issue execution against such party (*Rule* 345).

Under the last rule, the Court or Judge, if satisfied that the right to relief has arisen according to the terms of the judgment, may order—

(a) That execution issue accordingly; or

(b) May direct any issue or question necessary for the determination of the rights of the parties to be tried in any of the ways in which questions arising in an action may be tried (*Rule* 348).

Meaning of "Writ of Execution." In the rules the term "*writ of execution*" shall include:—

1. Writs of *fieri facias*,
2. Writs of *capias*,
3. Sequestration, and
4. Attachment.

and all subsequent writs for giving effect thereto (*Rule* 344).

[Writs of *Fi. Fa.* and *Ven. Ex.* to be issued and executed as heretofore (*Rules* 362, 363).]

"Issuing execution" shall mean the issuing of any process against any person's—

(a) Person, or

(b) Property (*Rule* 344).

Every person to whom

(a) Any sum of money, or

(b) Any costs,

shall be payable under the judgment, shall, immediately after the time when judgment was duly entered, be entitled to sue out one or more writs of *fieri facias* to enforce payment thereof, subject, *nevertheless*, as follows:—

EXECUTION—*continued.*

1. If the judgment is for payment within a period therein mentioned, no such writ to be issued until after the expiration of such period.

2. The Court or Judge may,
   (a) At the time of giving judgment, or
   (b) Afterwards,

   give leave to issue execution before, or may stay execution until any time after the expiration of the periods hereinbefore prescribed (*Rule* 352).

As between the original parties to an action, execution may issue at any time within 6 years from the recovery of the judgment (*Rule* 355).

Where—

(a) Six years have elapsed since the judgment, or
(b) Any change has taken place by death or otherwise in the parties entitled or liable to execution,

the party alleging himself to be entitled may apply to Court or Judge for leave to issue execution (*Rule* 356).

The Court or Judge may—

(a) Order execution to issue if satisfied that the party so applying is entitled, or
(b) Order that any issue or question necessary to determine the rights of the parties shall be tried in any way in which any question in an action may be tried.

And in either case the Court or Judge may impose such terms as to costs or otherwise as shall seem just (*Rule* 356).

Duration of writ of Execution. The writ, if unexecuted, is to remain in force for one year only from its issue, unless renewed (*Rule* 353).

EXECUTION—*continued.*

Renewal of writ. Such writ may be renewed at any time before its expiration, for one year from the renewal, and so on from time to time during the continuance of the renewed writ, either

(1) By being marked in the margin with a memorandum signed by the officer who issued the writ, or his successor, stating the date of such renewal, or

(2) By party giving a written notice of renewal to the Sheriff, signed by the party or his *attorney* (sic), and having the like memorandum (*Rule* 353).

And such renewed writ is to have effect and be entitled to priority according to the time of the original delivery thereof (*Rule* 353).

Every order of the Court or a Judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect (*Rule* 357).

In cases other than those mentioned in Rule 355, any party (not being a party to the action), who—

(a) Obtains any order, or

(b) In whose favour any order is made,

shall be entitled to enforce obedience to such order by the same process, as if he were a party to the action (*Rule* 358).

And any person (not being a party in an action) against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order, as if he were a party to the action (*Rule* 358).

Audita Querela abolished. No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against

EXECUTION—*continued.*

such judgment, upon the ground of facts which have arisen too late to be pleaded (*Rule* 359).

And the Court or Judge may give such relief and upon such terms as may be just (*Rule* 359).

Attachment of the person. A writ of attachment is to be issued as heretofore in Chancery, but only on leave of the Court or Judge to be applied for, on notice to the party against whom the attachment is to be issued (*Rules* 364-365).

[**Attachment of Debts.** *See* Order XLI].

Writ of Possession (*Lands*). A judgment for the recovery of the possession of lands is to be enforced as heretofore in actions of ejectment in the Superior Court of Common Law (*Rule* 379).

Where by any judgment any person herein named is directed to deliver up possession of lands—

1. To another person, or
2. At any specified time after being served with the judgment,

the person prosecuting such judgment is to be entitled *without an order* to the writ, on filing an affidavit shewing—

(a) Due service of the judgment, and

(b) That the same has not been obeyed (*Rule* 380).

[Such writ is to have the effect of a writ of assistance as well as of a *hab. fac. poss.* (*Rule* 381)].

Writ of Delivery (*Chattels*). A writ for delivery of chattels is to be issued and enforced as heretofore in actions of detinue in the Superior Courts of Common Law (*Rule* 382).

Part II.

PARTIES.

1. Plaintiffs. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist; whether

(a) Jointly,
(b) Severally, or
(c) In the alternative (*Rule* 89).

And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to without any amendment (*Rule* 89).

But the defendant (though unsuccessful) shall be entitled to his costs occasioned by so joining any persons who shall not be found entitled to relief, unless the Court otherwise directs (*Rule* 89).

1. Where an action has been commenced in the name of the wrong person as plaintiff, or
2. Where it is doubtful whether it has been commenced in the name of the right plaintiff,

the Court or Judge may order any other persons to be substituted or added as plaintiff or plaintiffs on such terms as shall be just,

(a) If satisfied that it has been so commenced through a *bona fide* mistake, and
(b) That is necessary for the determination of the real matter in dispute so to do (*Rule* 90).

PARTIES—*continued.*

JOINDER of Defendants.

All persons may be joined as defendants against whom right to relief is alleged to exist, whether—

(a) Jointly,

(b) Severally, or

(c) In the alternative (*Rule* 91).

And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities without any amendment (*Rule* 91),

It is not necessary that every defendant to an action shall be interested as to all the relief prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may be just to prevent any defendant from—

(a) Being embarrassed, or

(b) Put to expense, by being required to attend any proceedings in which he may have no interest (*Rule* 92).

The plaintiff may, at his option, join as parties to the same action all or any of the persons—

(a) Severally, or

(b) Jointly and severally,

liable on any one contract, including parties to bills and notes (*Rule* 93).

JOINDER of Parties where Plaintiff in Doubt.

Where in any action the plaintiff is in doubt as to the person from whom he is entitled to redress, he may as hereinafter mentioned, or as prescribed by any special order, join two or more defendants so that the question as to which is liable, and to what extent, may be determined between all parties (*Rule* 94).

PARTIES—*continued.*

Trustees, executors and administrators may sue and be sued on behalf of, or as representing the property or estate of which they are trustees, or representatives, without joining any of the beneficiaries; but the Court or Judge may, at any stage of the proceedings, order any of such persons to be made parties in addition to, or in lieu of the previously existing parties (*Rule* 95).

Married women—

1. *May sue or defend* without their husbands and and without next friends, in all cases relating to their—
   (a) Separate estate, or
   (b) Separate engagements,
   (c) Contracts, or
   (d) Torts, and in
   (e) Suits for alimony (*Rule* 97).
2. *May sue or defend* in other cases (by leave of Court or Judge) on giving such security as Court or Judge may require (*Rule* 97).
3. *May sue* in cases not thus provided for, as plaintiffs by their next friends as formerly in Chancery (*Rule* 97*a*).

Infants—

(a) *May sue* as plaintiffs by their next friend, and
(b) *May defend* by their guardians appointed for that purpose, or by the official guardian as formerly in Chancery (*Rule* 96).

Lunatics. Lunatics and persons of unsound mind not so found—

1. *May sue* (a) as plaintiffs by their committee, or
   (b) next friend;

PARTIES—*continued.*

2. *May defend* (a) by committee, or

(b) by guardians appointed for that purpose,

as formerly in Chancery (*Rule* 124).

Numerous parties having same interests. Where there are numerous parties having the same interest in one action, one or more of such parties may—

(a) Sue or be sued; or

(b) May be authorised by the Court to defend, on behalf of, or for the benefit of, all parties so interested (*Rule* 98).

Class Representatives.

Where the right of—

1. An heir at law,
2. The next of kin, or
3. A class,

depends on the construction which the Court may put on an instrument,

And where (a) it is not known, or

(b) it is difficult to ascertain,

who is or are such heir at law, or next of kin, or class; and the Court considers that in order—

(a) to save expense, or

(b) for some other reason,

it will be convenient to have the questions of construction determined before the heir at law, &c., is ascertained by inquiry, or otherwise, the Court may appoint some one or more person or persons to represent such heir at law, next of kin, or class (*Rule* 99).

And the judgment of the Court, in the presence of such persons, shall be binding upon the party or parties, or class so represented (*Rule* 99).

PARTIES—*continued.*

Partners. Any two or more persons, claiming or being liable as co-partners, may sue, or be sued in the name of their firm; and any party *may apply by summons* to a Judge for a statement of the names of the co-partners, to be furnished and verified on oath as the Judge may direct (*Rule* 100).

Any person carrying on business in firm name may be sued in the name of such firm (*Rule* 101).

[The provisions as to parties in Chy. G. Orders 58, 59, 60 and 61, are to be in force in all actions in the High Court, subject to the act and rules (*Rule* 102).]

Misjoinder. No action is to be defeated by reason of misjoinder of parties, and the Court may in every action deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it (*Rule* 103).

The Court or Judge may order the names of any plaintiffs or defendants to be struck out at any time, and the names of any parties to be added (*Rule* 103 *a*)

The order may be made—

1. At any stage of the proceedings;
2. And either (a) upon, or (b) without the application of either party, and on such terms as may be just (*Rule* 103 *a*).

No person is to be added—

(a) As a plaintiff suing without a next friend, or

(b) As the next friend of a plaintiff under any disability,

without his own consent thereto (*Rule* 103 *b*).

All parties added *as defendants* are to be served with a summons or notice in manner mentioned in *Rule* 105, or in the manner prescribed by any special order, and

PARTIES—*continued.*

the proceedings as against them shall be deemed to have begun only on the service of such summons or notice (*Rule* 103).

Application to add or strike out, &c. Any application to—

(a) Add,
(b) Strike out, or
(c) Substitute,

a plaintiff or defendant may be made to the Court or a Judge—

1. *At any time before trial,*
   (a) By motion, or
2. *At the trial,* in a summary manner (*Rule* 104).

FILING of Amended Writ, on Defendant being added.

Where a defendant is added [unless otherwise ordered] the plaintiff shall sue out an amended writ of summons, and serve such writ, or notice in lieu thereof, on the new defendant in the same manner as original defendants are served (*Rule* 105).

AMENDMENT, and Service, of Claim.

If statement of claim has been delivered, the same is to be amended [unless otherwise ordered] in such manner as may be rendered desirable (*Rule* 106).

SERVICE of Amended Claim.

A copy of such amended claim is to be delivered to the new defendant—

(a) At the time when he is served with the writ, or notice, or

PARTIES—*continued.*

(b) Within 4 days after his appearance (*Rule* 106)

Third parties. 1. Where a defendant—

(a) Is or claims to be entitled to (i) any contribution, or (ii) indemnity, or (iii) any other remedy or relief over against any other person; or

(b) Where from any other cause it appears to the Court or a Judge that a question in the action should be determined (i) not only as between plaintiff and defendant, but (ii) as between plaintiff, defendant, and any other person, or between either of them,

the Court or Judge may (on notice being given to such last mentioned person) make such order as may be proper for determining the question (*Rule* 107).

2. And where, under *Rule* 107, it appears to the Court or a Judge at any time—

(a) Before, or

(b) At the trial,

that such a question should be determined, such notice is to be given by the plaintiff as the Judge may direct,

(a) Before, or

(b) At the time of making the order for having such question determined (*Rule* 109).

[If made at the trial Judge may postpone trial (*Rule* 109).]

[*See* Form of Notice, Forms 18.]

SERVING of Notice, &c., by Defendant.

In such case, the defendant is to file with the proper officer a notice of such claim, and is within the time for delivery of his statement of defence, unless otherwise

PARTIES—*continued.*

ordered, to serve such third person (according to the rules relating to service of the writ) with

1. A copy of such notice, and
2. A copy of the statement of the plaintiff's claim, *or if there is not one, then with a copy of the writ in the action* (*Rule* 108).

If the third party desires to dispute the plaintiff's claim as against such defendant, he must enter an appearance in the action within 8 days from the service of the notice, or after that time may be allowed to appear by the Court or a Judge (*Rule* 110).

After such appearance the party giving the notice is to apply to the Court or a Judge for directions as to the mode of determining the question in the action, and liberty to such third person to defend may be given on such terms as shall seem just, and generally all proper directions may be given (*Rule* 111).

If the third person, after being so served, makes default in appearing, he is to be deemed to admit the validity of the judgment which may be obtained against such defendant in the action, whether obtained by consent or otherwise (*Rule* 110).

[*See* also *sect.* 16 (*O. J. Act* 1881), *sub-sect.* 4.]

The Court or Judge is to give directions to prevent the recovery of the plaintiff's claim being unnecessarily delayed by reason of questions between defendants, in which plaintiff is not concerned where this can be done without injustice to the defendants (*Rule* 112).

JOINDER of Causes of Action.

Subject to the following rules, the plaintiff may unite in the same action and in the same statement of claim several causes of action; but if it appear that they can-

JOINDER of Causes of Action—*continued.*

not be conveniently tried or disposed of together, the Court or Judge may—

(a) Order separate trials; or

(b) May make such order as may be necessary or expedient for the separate disposal thereof (*Rule* 115).

In actions for recovery of land. No cause of action (unless by leave,) shall be joined with an action for the recovery of land, except—

(a) Claims in respect of mesne profits; or

(b) Arrears of rent in respect of the premises claimed or any part thereof; or

(c) Damages for breach of any contract under which the premises or any part thereof are or is held; or

(d) Claims in actions on mortgages for recovery of the mortgage money and for foreclosure or sale (*Rule* 116).

Claims by an assignee in insolvency as such shall not be joined with any claim by him in any other capacity,

unless by leave of a Court or Judge (*Rule* 117).

Claims by or against husband and wife may be joined with claims by or against either of them separately (*Rule* 118).

Claims by or against an executor or administrator, as such, may be joined with claims by or against him personally: provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*Rule* 119).

JOINDER of Causes of Action—*continued.*

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant (*Rule* 120).

APPLICATION by Defendant to confine Causes of Action.

Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may, *at any time*, apply to the Court or a Judge for an order confining the action to such of the causes as may be so disposed of in one proceeding (*Rule* 122).

If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or Judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or Judge may—

(a) Order any of such causes of action to be excluded; and

(b) May direct the statement of claim [or if no claim has been delivered, the copy of the writ of summons and the indorsement of claim on the writ] to be amended accordingly; and

(c) Make such order as to costs as shall be just (*Rule* 123).

PLEADINGS generally.—*The ordinary pleadings are as follows:—*

(*Claim.*) Unless the defendant at the time of his appearance states that he does not require one, the plaintiff is to deliver a statement of claim *within three months from appearance.* The

PLEADINGS generally —*continued.*

(*Defence.*) defendant is then to deliver a statement of his defence, set-off, or counter-claim (if any) *within eight days* from delivery of plaintiff's statement, or from the time limited for appearance whichever shall be last; and the

(*Reply.*) plaintiff is to deliver his reply (if any) thereto *within three weeks from delivery of last defence* (*Rules* 158-160-173).

[The above times may be extended by Court or Judge.]

The chief rules as to all pleadings are as follows:—They are to be as brief as the nature of the case will admit (*Rule* 126*c*).

Any costs occasioned by unnecessary prolixity are to be borne by the party chargeable with the same (*Rule* 126*c*).

They are to be divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation (*Rule* 128).

They are to contain, as concisely as may be, a statement of the material facts on which the party pleading relies, *but not the evidence by which they are to be proved* (*Rule* 128).

Dates, sums, and numbers to be expressed in figures (*Rule* 128).

The signature of counsel is not to be necessary (*Rule* 128).

They are to be printed or written (or partly the one and partly the other) (*Rule* 129).

No more than 4 copies of any pleading or document in the progress of the cause are to be allowed, exclusive of one draft (*Rule* 129).

[If more than 3 copies, exclusive of draft required, pleading or document may be printed, and reasonable

PLEADINGS generally—*continued.*

disbursements and 30 cents per folio shall be allowed in lieu of charges for copies (*Rule* 130).]

They are to be delivered to the solicitor or to the party if he appears in person, and if no appearance has been entered by being posted up in the office from which the writ was issued (*Rule* 131),

They are to be delivered between the parties and are to be marked on the face with—

1. The date when filed;
2. The division to which action assigned;
3. The title of the action;
4. The description of the pleading;
5. The name and place of business of the solicitor and agent (if any) filing them; or

5*a*. The name and address of the person filing the same, if acting in person (*Rule* 132).

Each party is to admit—

(a) Such of the material allegations in the statement of the opposite party as are true; or

(b) May give notice by his statement, *or otherwise*, that he admits the truth of case generally, or of any part stated, or referred to, in the statement of the opposite party (*Rule* 240).

And he must make admissions when practicable, with such qualifications as may be necessary to protect his interests, by reference to the numbers of the paragraphs in the pleading to which they relate (*Rule* 146).

And where the Court or a Judge shall be of opinion that any allegations or fact denied, or not admitted by any party, ought to have been admitted, the Court may make such order as shall be just with respect to any

PLEADINGS generally—*continued.*

extra costs occasioned by their having been denied or not admitted (*Rule* 63).

Each party must in any pleading not being a petition or a writ of summons allege all facts he means to rely on not appearing in previous pleadings (if any) and

(2) Raise all grounds of defence or reply which if not raised on the pleadings,

(a) Would be likely to take the opposite party by surprise, or

(b) Would raise new issues of fact not arising out of the pleadings, *e.g.*, Fraud, Statute of Limitations, Release (*Rule* 147).

Save as above, silence of a pleading as to any allegation in the previous pleading of the opposite party is not to be construed as an implied admission of its truth; and any allegation introduced to prevent such admission and not for making the grounds of defence intelligible, is to be considered impertinent (*Rule* 148).

Where either party wishes to deny the right of any other party to claim as—

(a) Executor;
(b) Trustee;
(c) Assignee in insolvency;
(d) In any representative capacity;
(e) In any other alleged capacity; or if he wishes to deny
(f) The alleged constitution of any partnership firm,

he shall deny the same specifically or the same will be taken to be admitted (*Rule* 140).

Pleas in "Abatement," and "New Assignment" are abolished, and any matter formerly introduced by *new assignment* is to be introduced by amendment of the statement of claim (*Rules* 142, 143).

PLEADINGS generally—*continued.*

A bare denial by anybody of a contract alleged in any pleading is to be considered only as a denial of the making of such contract *in fact*, and not of its legality or sufficiency in law, whether with reference to the Statute of Frauds or otherwise (*Rule* 141).

No pleading (not being a petition or summons) shall—
[except by way of amendment]—

1. Raise any new ground of claim; or
2. Contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same (*Rule* 149).

Neither party need in any pleading allege any matter of fact which—

1. The law presumes in his favour, or
2. As to which the burden of proof lies upon the other side,

unless the same has first been specifically denied (*Rule* 139).

[For example, the consideration for a bill where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

Provisions for shortening and simplifying pleadings

1. *As to Malice.*—Where it is material to allege

(1.) Malice,
(2.) Fraudulent intention,
(3.) Knowledge, or
(4.) Other condition of the mind of any person,

it is to be sufficient to allege the same as a fact, without setting out the circumstances from which it is to be inferred (*Rule* 136).

PLEADINGS generally—*continued.*

2. *Notice.*—When it is material to allege notice, it is to be sufficient to allege such notice as a fact, unless the form or precise terms of such notice is material (*Rule* 137).

3. *Implied Contract.*—When any contract (or relation between any persons,) is to be *implied*—

(a) From a series of letters,
(b) Series of conversations, or
(c) Otherwise, from a number of circumstances,

it is to be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances, without setting them out in detail (*Rule* 138).

[And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one, as to be implied from such circumstances, he may state the same in the alternative (*Rule* 138).]

4. *Documents.*—Where the contents of any document are material, it is to be sufficient to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words are material (*Rule* 135).

PLEADING Matters Arising during the Action.

1. By Defendant.

Any ground of defence which has arisen since action brought, but *before* the defendant has delivered his defence may be pleaded by the defendant in his defence;

(a) Either alone, or
(b) Together with other grounds of defence (*Rule* 151).

PLEADINGS generally—*continued.*

2. By Defendant—after delivery of defence.

After delivery of defence, defendant may within 8 days after ground of defence has arisen—

(1) Deliver a further defence setting forth such new grounds, or

(2) Introduce the same by amendment into his statement of defence (*Rule* 153).

3. By Plaintiff.

After delivery of statement of defence, any ground of defence arising to any set-off or counter-claim may be

(1) Pleaded by the plaintiff in his reply; or

(2) May be introduced by amendment into his statement of claim within 3 weeks after delivery of last defence (unless time extended by Court or Judge)(*Rule* 152)].

4. By Plaintiff—after delivery of Reply.

Where any ground of defence to any set-off or counter-claim arises after the expiration of 3 weeks from the delivery of the last defence, the plaintiff may within 3 days after ground of defence has arisen—

(1) Deliver a further reply setting forth such new grounds, or

(2) Introduce the same by amendment into his statement of claim (Rule 154).

In any such case the amendment of the pleading filed is to be made without order on filing—

(1) A præcipe, and

(2) An affidavit that the matter of amendment arose within 8 days before making the amendment (*Rule* 155).

PLEADINGS generally—*continued.*

[In other cases not provided for as above such amendment, or delivery of further defence, or reply, is to be made by leave of Court or Judge on notice supported by affidavit (Rule 156).]

CONFESSION of Defence by Plaintiff.

Whenever any defendant, in his defence, or in any further defence, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence; and he may thereupon sign judgment for his costs up to the time of such defence, unless otherwise ordered (*Rule* 157).

[*See* Form of Confession, Forms 17].

CHANGE of Parties by Marriage, Death, &c.

1. An action is not to abate by reason of
   (i) The death
   (ii) Marriage, or
   (iii) Bankruptcy

of any of the parties, if the cause of action survive or continue, and

1. Is not to become defective by
   (a) The assignment,
   (b) Creation, or
   (c) Devolution

of any estate or title *pendente lite* (*Rule* 383).

[In case of such assignment, &c., action may be continued by or against person to or upon whom such estate or title has come or devolved (*Rule* 384).]

CHANGE of Parties by Marriage, Death, &c.—*continued.*

Where by reason of

1. Marriage,
2. Death,
3. Bankruptcy, or
4. Any other event occurring after the commencement of an action, and causing

A change or transmission of interest or liability;

Or by reason of

5. Any person coming into existence after the commencement of the action,

it becomes necessary or desirable that any person not already a party to the action should be made a party, or that any person already a party should be made a party thereto in another capacity, an order that the proceedings be carried on between the continuing parties and such new parties may be obtained (*Rule* 384).

[The order may be obtained on præcipe upon allegation of such change or transmission of interest or liability, or of such person interested having come into existence (*Rule* 384).]

The order so obtained is to be served upon

(a) The continuing party or parties, or
(b) Their solicitors, and
(c) Upon each new party,

unless the Court or Judge otherwise directs (*Rule* 386).

The order is to be binding on the persons served therewith from the date of service (*Rule* 386).

Where any person who shall be served with such order is—

(a) Under no disability, or
(b) Under no disability other than coverture, or
(c) Under any disability other than coverture, but having a guardian *ad litem*,

CHANGE of Parties by Marriage, Death, &c.—*continued.*

such person may apply to the Court or Judge to discharge or vary such order within 12 days from the service thereof (*Rule* 387).

[The copy of the order served is to be endorsed with Form 20].

Where any person being under any disability other than coverture, and not having a guardian *ad litem* appointed is served as aforesaid—

1. Such person may apply to discharge or vary such order within 12 days from the appointpointment of a guardian *ad litem*, and
2. Until such period of 12 days shall have expired, the order is to have no force or effect as against such last-mentioned person (*Rule* 389).

Where the order is served out of Ontario the party served is to have the same time to apply to discharge the order, as a defendant has to appear to a writ of summons so served (*Rule* 390).

[But an application may be made for shortening the time (*Rule* 390).]

[Where the Court or Judge authorizes publication instead of service, a time is to be appointed at the same time for applying to discharge the order (*Rule* 391).]

DISCONTINUANCE.

The plaintiff may, by notice in writing—filed and served—

(a) At any time before receipt of defendant's statement of defence, or

(b) After the receipt thereof, before taking any other proceeding

DISCONTINUANCE—*continued.*

[Other than a mere interlocutory application],

1. Wholly discontinue his action, or
2. Withdraw any part or parts of his complaint (*Rule* 170).

Upon such discontinuance the plaintiff shall pay the defendant's costs, or, if the action is not wholly discontinued, the defendant's costs of the matter so withdrawn (*Rule* 170).

Such costs are to be taxed, and such discontinuance or withdrawal is not to be a defence to any subsequent action (*Rule* 170*a*).

[Save as above mentioned a plaintiff cannot withdraw the Record, or discontinue without leave of the Court or a Judge; but the Court or Judge may—

(a) Before, at, or after the hearing or trial, and
(b) As to any other action, and
(c) Otherwise as may seem fit, and
(d) Upon terms as to costs,

order the action to be discontinued, or any part of the claim to be struck out (*Rule* 170c).

And the Court or Judge may similarly—

(i) Upon the application of a defendant, and
(ii) With the like discretion as to terms,

order the whole or any part of the defence or counterclaim to be withdrawn or struck out (*Rule* 170*c*).

But a defendant may not withdraw his defence or any part thereof without such leave (*Rule* 170*c*).

Costs on discontinuance. A defendant may sign judgment for costs of an action, if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action is not wholly discontinued (*Rule* 172).

QUESTIONS of Law.

Special case. The parties may, after the writ of summons has been issued, concur in stating questions of law arising in the action in the form of a special case for the opinion of the Court (*Rule* 248.)

Every special case is to be divided into paragraphs numbered consecutively, and to state concisely such facts and documents as are necessary to enable the Court to decide the question raised by it (*Rule* 248*b*).

Upon the argument of such case, the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents any inference, whether of law or fact, which might have been drawn therefrom if proved at a trial (*Rule* 248*c*).

In addition to the above, if it appears that there is in any action a question of law which it might be convenient to have decided before any evidence is given, or any question or issue of fact is tried, or before any reference is made to a referee or arbitrator, an order may be made for such point of law to be raised—

1. By special case, or
2. In such other manner as the Court or Judge deems expedient (*Rule* 249).

[All further proceedings as the decision of such question may render unnecessary are thereupon to be stayed (*Rule* 249).]

Every special case is to be—

(i) Signed by the parties or their solicitors;
(ii) Filed by the plaintiff; and

copies for the use of the Judges are to be delivered by the plaintiff (*Rule* 256).

Where (a) A married woman,
(b) Infant, or
(c) Person of unsound mind,

SPECIAL Case—*continued.*

is a party to an action, no special case shall be set down for argument without leave, to be obtained on application supported by sufficient evidence that the statements in the case so far as they affect the interests of such person are true (*Rule* 251).

[Special case may be entered by either party for argument on præcipe (Form 87) or on production of a copy of the order made on such application (*Rule* 252).]

The parties to a special case may, if they think fit, enter into an agreement in writing that, on the judgment being given in the affirmative or negative, of the question raised by the special case, a sum of money,

(a) Fixed by the parties, or

(b) To be ascertained by the Court, or

(c) In such manner as the Court shall direct,

shall be paid by one of the parties to the other, either with or without costs (*Rule* 248).

Judgment may be entered for such sum so agreed, with or without costs, and execution issue may forthwith, unless—

(a) Otherwise agreed; or

(b) Stayed on appeal (*Rule* 248*a*).

These rules are to apply—

1. To every special case stated in an action, or
2. In any proceeding incidental to an action (*Rule* 253).

EVIDENCE generally.

In the absence of agreement between the parties, the witnesses—

(a) At the trial of any action, or

(b) On any assessment of damages,

EVIDENCE generally—*continued.*

are to be examined *viva voce* and in open Court, unless the Court or Judge orders—

1. Any particular fact to be proved by affidavit; or
2. That the affidavit of any witness be read on such conditions as the Court or Judge may think reasonable; or
3. That any witness, whose attendance ought for some sufficient reason to be dispensed with, be examined before an examiner (*Rule* 282).

[*Proviso.* Provided, that when it appears that the other party *bona fide* wishes to cross-examine a witness, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit (*Rule* 282).

Upon (a) Any motion,
(b) Petition, or
(c) Summons,

evidence may be given by affidavit; but any person having made an affidavit

(a) To be used, or
(b) Which shall be used

on any motion, petition, or other proceeding before the Court, is to attend for cross-examination on being served with a subpœna (*Rule* 283).

[But the Court may make an interim order to meet the justice of the case (*Rule* 283).]

[Affidavits are to be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof may be admitted (*Rule* 284).]

EVIDENCE generally—*continued.*

The costs of affidavits which unnecessarily set forth—

(a) Matters of hearsay,

(b) Argumentative matter, or

(c) Copies of, or extracts from, documents,

are to be paid by the party filing such affidavits (*Rule* 284).

The Court and Judge may, where it appears necessary,

1. Make an order for the examination upon oath of any witness or person—
   (a) Before any officer of the Court, or before
   (b) Any other person or persons, and
   (c) At any place; and
2. May order any deposition so taken to be filed in Court; and
3. May empower any party to give such deposition in evidence on such terms as the Court or Judge may direct (*Rule* 285).

Evidence by affidavit.—Where the parties have consented that the evidence shall be by affidavit—

1. The plaintiff is to file his affidavits
   (a) Within 14 days after such consent, or
   (b) Within such time as the parties may agree upon, or
   (c) Within such time as a Judge in Chambers may allow;

and 2. Must deliver to the defendant or his solicitor a list thereof (*Rule* 301).

1. The defendant is to file his affidavits—
   (a) Within 14 days after delivery of the plaintiff's list, or

EVIDENCE generally—*continued.*

(b) Within such time as the parties may agree upon, or

(b) Within such time as a Judge in Chambers may allow;

and 2. Deliver to the plaintiff or his solictor a list thereof (*Rule* 302).

1. The plaintiff shall file his affidavits *in reply*—

(a) Within 7 days after the expiration of the 14 days aforesaid, or

(b) Within such other time as aforesaid.

2. He is to confine such affidavits to matters strictly in reply, and

3. Is to deliver to the defendant or his solicitor a list thereof (*Rule* 303).

When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial (*Rule* 304).

Such notice as last mentioned is to be served—

(a) At any time within 14 days after the expiration of the time limited for filing affidavits in reply; or

(b) Within such time as in any case the Court or a Judge may specially appoint (*Rule* 304).

Unless such deponent is produced, his affidavit shall not be used as evidence unless by the special leave of the Court (*Rule* 304).

The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production (*Rule* 304).

EVIDENCE generally—*continued.*

The party to whom such notice is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined (*Rule* 305).

When the evidence in any action is taken by affidavit; the notice of motion for judgment is to be given at the same time after the close of the evidence, as in other cases is by the rules provided after the close of the pleadings (*Rule* 306).

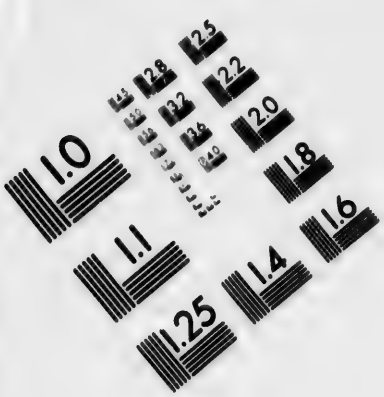
MOTION for Judgment.

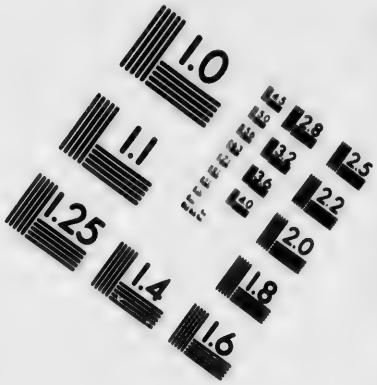
Except where by the act, or the rules, it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment (*Rule* 315).

1. Motion to set aside judgment, and enter another—

(A) *Where trial before a jury.* Where, at or after a trial by a jury the Judge has directed that any judgment be entered, (a) any party may, (b) without any leave reserved, apply to set aside such judgment, and enter any other judgment on the ground that the judgment is wrong on the finding of the jury upon the questions submitted to them (*Rule* 316).

(B) *Where trial by Judge without a jury.* Where, at or after trial by a Judge, any judgment has been directed to be entered, (a) any party may, (b) without leave, apply to set aside such judgment, and enter any other, upon the ground that upon the finding as entered the judgment so directed is wrong (*Rule* 317).





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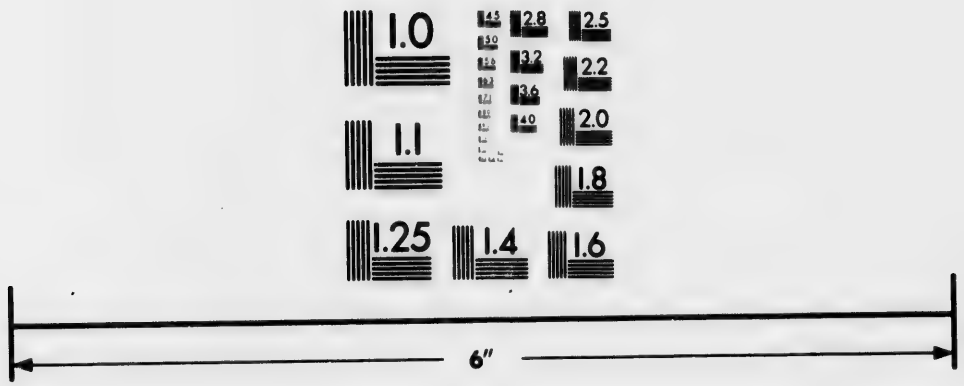

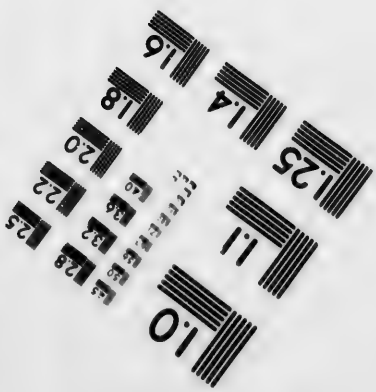

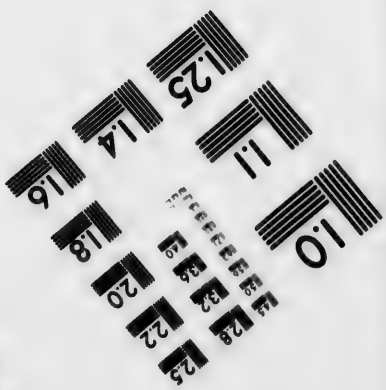

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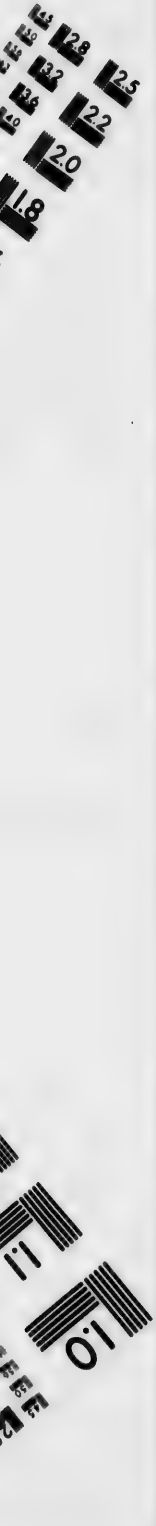
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MOTION for Judgment—*continued.*

[Application under *Rule* 317 to be to Court of Appeal or Divisional Court (*Rule* 317*a*).]

2. Motion where issues directed.

1. Where issues have been ordered to be tried, or
2. Issues or questions of fact to be determined in any manner,

and there is no direction of a Court or Judge for the entry of judgment, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined (*Rule* 318).

If he does not set it down and give notice within 10 days after his right to do so has arisen, then any defendant may (*Rule* 318).

3. Motion where some issues have been tried (by leave). Where issues have been ordered to be tried, or issues or questions of fact to be determined, and some only have been tried, any party who considers that the result of such trial or determination—

(a) Renders the trial of the others of them unnecessary, or

(b) Renders it desirable that the trial, &c., should be postponed,

may apply for leave to set down action on motion for judgment without waiting for such trial or determination (*Rule* 319).

And the Court or Judge may, if satisfied of the expediency thereof—

1. Give leave, on such terms, (if any) as may be just, and
2. May give any directions which may be desirable as to postponing the trial of other questions of fact (*Rule* 319).

MOTION for Judgment—*continued.*

4. Motion after one year (by leave). No action shall be set down on motion for judgment after the expiration of one year from the time when the party became entitled to do so—

Except by leave of the Court or a Judge (*Rule* 320).

5. Delivery or postponement of judgment.

Upon (a) A motion for judgment, or

(b) A motion for a new trial,

the Court may give judgment accordingly if satisfied that—

(a) It has all necessary materials for finally determining the questions in dispute, or

(b) Any of them, or

(c) For awarding any relief sought (*Rule* 321).

If the Court is of opinion that it has not sufficient materials before it, it may—

1. Direct the motion to stand over for further consideration, and

2. Direct (a) such issues or questions to be tried and determined, and (b) such accounts and inquiries to be taken and made, as it may think fit (*see Waddell* v. *Blockey*, 10 *Ch. D.* 416; *Hamilton* v. *Johnson*, 5 *Q. B. D.* 263) (*Rule* 321).

6. Application for judgment on admissions. Any party may at any stage of the action apply to the Court or Judge for such order as he may be entitled to—

(1) Upon any admissions of fact in the pleadings, or

(2) In the examination of any other party,

without waiting for the determination of the other questions; or he may so apply—

MOTION for Judgment—*continued.*

(1) Where the only evidence consists of documents, and affidavits proving their execution or identity without necessity of cross-examination; or

(2) Where infants are concerned, and evidence is only necessary so far as they are concerned to prove undisputed facts (*Rule* 322)

The foregoing rules (315 to 322) are not to apply to such applications, but any such application may be made by motion, so soon as the right of the party applying has appeared from the pleadings (*Rule* 322).

The Court or Judge may, on such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit (*Rule* 322). *And see Tildesley* v. *Harper*, 7 *Ch. D.* 403; *and Chilton* v. *Corporation of London*, 7 *Ch. D.* 735).

7. Pending application turned into motion for judgment. The Court or Judge may direct any application to be turned into—

1. A motion for judgment, or
2. A hearing of the cause or matter

where it is made to appear that it will be conducive to the ends of justice to permit it (*Rule* 323).

[And thereupon the Court or Judge may make such order as to procedure as may be requisite; and on the hearing may pronounce a judgment or make such order as may be deemed expedient (*Rule* 321)].

8. Motion for immediate judgment (by leave). At any time after issue of writ, notice of motion for judgment may be served forthwith by leave of the Court or Judge where it is made to appear *ex parte* that to permit it would be conducive to the ends of justice (*Rule* 324).

MOTION for Judgment—*continued.*

[When such permission is granted the Court or Judge is to give directions as to service of the notice and filing the affidavits (*Rule* 324)].

On the hearing of such motion the Court may—

1. Grant, or
2. Refuse the application, or
3. Give such directions for
   (a) Examination of the parties or witness,
   (b) For making further inquiries, or
   (c) With respect to the further prosecution of the suit,

as the circumstances of the case may require, and on such terms as to costs as the Court thinks right (*Rule* 324*a*).

APPLICATIONS IN CHAMBERS.

The Master in Chambers is to have the jurisdiction heretofore possessed by the Clerk of the C. and P., Q. B., and the Referee in Chancery Chambers (*Rule* 420).

Applications in Chambers in Toronto (not *ex parte*) are to be on notice instead of by summons (*Rule* 412).

Two clear days notice to be given (*Rule* 407).

Applications in Chambers in the Country are to be by summons (*Rule* 425).

The County Judge of the County in which the action is brought *after January 1st, 1882*, is to have the same power and jurisdiction as the Master in Chambers, except in the following cases—

1. Granting leave for service out of Ontario, or
2. Allowing service of a writ, or notice of a writ, out of Ontario (*Rule* 422).

APPLICATION in Chambers—*continued.*

[Where there is a Local Master *who does not practise as a barrister or solicitor and who has not taken out a certificate to practise* he is to have similar powers and jurisdiction in actions brought in the Chancery Division. In such counties the County Judge is only to exercise such jurisdiction in actions brought in the Q. B. and C. P. Divisions (*Rule* 422).]

The jurisdiction of the County Judge, under above *Rule* shall not apply

(i) Where the writ is issued in York;

(ii) To any action (except by consent,) where the solicitors for all parties do not reside or have not offices in the County Town of the County in which the action is brought; or

(iii) Where any party who has no solicitor does not reside in or has no place of business in the County, (*Rule* 422*a*).

[County Judge's power to make *ex parte* orders is not subject to this limitation [*Rule* 423).]

Chamber matters proper for decision of a Judge may be referred to such Judge (Rule 426).

Appeals from Chambers are to be by motion on notice (2 clear days notice to be given, *Rule* 407) served within 4 days after decision complained of, unless time extended by a Judge or the officer appealed from (*Rule* 427).

And the motion is to be brought on within 8 days after such decision, unless time extended as aforesaid, or if no Court to which appeal can be made within such 8 days, then on the first day such Court sits after expiration of such 8 days (*Rules* 414, 427).

NOTE.

It is to be noticed that in the preceding pages there is no detailed abstract of the act, nor of the following Rules.

2. Interpleader.
3, 114. Administration.
70. Duty of official guardian of infants.
86*b*. " " " "
113. How service of judgment or order on infants or non-compotes is to be binding.
244 to 247. Provisions as to referees and arbitrators.
276 to 281. " " " " "
286 to 300. Commissions to examine witnesses.
331 to 337. General provisions as to foreclosure sales and redemption.
338. Correction of clerical mistakes in judgments or orders.
366 to 378. Attachment of debts.
392 to 395. Transfer and consolidation of actions.
396 to 403. Interlocutory orders as to mandamus, injunctions or interim preservation of property.
404 to 411. Motions and other applications.
415 to 427, and 475 to 479. Offices and officers.
428 to 450. Costs.
451 to 453. Notices and paper.
454 to 463. Time.
464 to 470. Affidavits.
471, 472. Divisional and other Courts.
473, 474. Effect of non-compliance with Rules and Errors.
480 to 483. Sittings and vacations.
484. Exceptions from the Rules.
485. Forms to be used.
486 to 490. County Courts.
493, 494. Proceedings in pending business.

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